Supreme Court, U.S.
FILED
MAY 23 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JARBOE-LACKEY FEEDLOTS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID O. STEWART
(Counsel of Record)
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorney for Petitioner

Of Counsel:

CHARLES D. McATEE
ANNE L. BAKER
EIDSON, LEWIS, PORTER & HAYNES
1300 Merchants National Bank Bldg.
Topeka, KS 66612
(913) 233-2332

THE CASILLAS PRESS, INC. 1717 K Street N.W. • Washington, D.C. • 223-1220

140 pp

QUESTIONS PRESENTED*

1. Whether, in determining if "the position of the United States" was "substantially justified" so as to preclude an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. §2412(d)(1)(A), the court of appeals correctly refused to consider the justification for the government's action which precipitated the litigation, and thus confined its inquiry to the justification for the government's position in court.

2. Whether the "substantial justification" standard for denying attorney's fees under the Equal Access to Justice Act, is one of "reasonableness" or whether it requires a higher level of proof.

3. Whether a court should provide an evidentiary hearing on an application for attorneys' fees under the Equal Access to Justice Act when the private party has proffered significant evidence, which is not otherwise in the record, of its entitlement to such fees.

---

*The proceeding below was styled *United States v. 2,116 Boxes of Boned Beef*. Petitioner Jarboe-Lackey Feedlots, Inc., a Kansas corporation, was the intervenor-claimant below and is the sole petitioner to this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT 2

A. The Trial In District Court 3

B. The Claim For Attorneys' Fees In The District Court 5

C. Petitioner's Proffered Evidence 6

D. The Court of Appeals' Decision 7

REASONS FOR GRANTING THE WRIT 9

I. THE "POSITION OF THE UNITED STATES" INCLUDES THE UNDERLYING GOVERNMENT ACTION LEADING TO THE LITIGATION 10

II. TO BE SUBSTANTIALLY JUSTIFIED, THE GOVERNMENT'S POSITION MUST BE MORE THAN MERELY REASONABLE 15

III. PETITIONER IS ENTITLED TO PRESENT EVIDENCE ON ITS FEE APPLICATION 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases: **Page**

Ashburn v. *United States*,
577 F. Supp. 59 (N.D. Ala. 1983) 11

Broad Ave. Laundry & Tailoring v. *United States*,
693 F.2d 1387 (Fed. Cir. 1982) 11

Citizens for Responsible Resource Development v. *Watt*,
579 F. Supp. 431 (M.D. Ala. 1984) 11

Cornella v. *Schweiker*,
728 F.2d 978 (8th Cir. 1984) 11

Dougherty v. *Lehman*,
711 F.2d 555 (3d Cir. 1983) 15

Environmental Defense Fund v. *Watt*,
554 F. Supp. 36 (E.D.N.Y. 1982), *aff'd on other grounds*, 722 F.2d 1081 (2d Cir. 1983) 11, 14

Foley Constr. Corp. v. *U.S. Army Corps of Engineers*,
716 F.2d 1202 (8th Cir. 1983) 15

Grand Boulevard Improvement Ass'n v. *City of Chicago*,
553 F. Supp. 1154 (N.D. Ill. 1982) 11

Jarboe-Lackey Feedlots, Inc. v. *United States*,
Ct. Clms. No. 233-84 C 5

Lankford v. *Law Enforcement Assistance Admin.*,
620 F.2d 35 (10th Cir. 1980) 12

McQuiston v. *Marsh*,
707 F.2d 1082 (9th Cir. 1983) 8, 10, 18

Moats v. *United States*,
576 F. Supp. 1537 (W.D. Mo. 1984) 11

Moholland v. *Schweiker*,
546 F. Supp. 383 (D.N.H. 1982) 11

Page

Natural Resources Defense Council, Inc. v. *EPA*,
703 F.2d 700 (3d Cir. 1983) 11, 12

Nunes-Correia v. *Haig*,
543 F. Supp. 812 (D.D.C. 1982) 15

Operating Engineers Local Union No. 3 v. *Bohn*,
541 F. Supp. 486 (D. Utah 1982) 11

Rawlings v. *Heckler*,
725 F.2d 1192 (9th Cir. 1984) 11, 14

Robinson v. *Ritchie*,
646 F.2d 147 (4th Cir. 1981) 18

Spencer v. *NLRB*,
712 F.2d 539 (D.C. Cir. 1983), *cert. denied*,
52 U.S.L.W. 3756 (Apr. 17, 1984) 7, 11, 12, 14, 15

Tyler Business Services, Inc. v. *NLRB*,
695 F.2d 73 (4th Cir. 1982) 11

United States v. *2,116 Boxes of Boned Beef*,
516 F. Supp. 321 (D. Kan. 1981) 2

United States v. *2,116 Boxes of Boned Beef*,
726 F.2d 1481 (1984) 1

Wolverton v. *Schweiker*,
533 F. Supp. 420 (D. Idaho 1982),
aff'd in part and rev'd in part,
726 F.2d 580 (9th Cir. 1984) 11, 15

Wyandotte Savings Bank v. *NLRB*,
682 F.2d 119 (6th Cir. 1982) 15

Page

Statutes and Regulations:

21 U.S.C. §601(m) (Federal Meat Inspection Act) 3

28 U.S.C. §2412(d) 2, 5, 16

28 U.S.C. §2412(d)(1)(A) 10, 12

28 U.S.C. §2412(d)(2)(C) 11

28 U.S.C. §2412(d)(3) 12

Equal Access to Justice Act, §204(a) 2

28 U.S.C. §1254(1) 2

21 C.F.R. §310.50(b) (1983) 4

44 Fed. Reg. 54852 (1979) 3

Legislative History:

H. Rep. No. 1434, 96th Cong., 2d Sess. 25 (1980) 9

H. Rep. No. 1418, 96th Cong., 2d Sess. 21 (1980) 16

S. Rep. No. 253, 96th Cong., 1st Sess. 1 (1979) 15

H.R. 5479, 98th Cong., 2d Sess. (1984) 10

S. 919, 98th Cong., 2d Sess. (1984) 10

126 Cong. Rec. S. 23690 (Sept. 26, 1980) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No.

JARBOE-LACKEY FEEDLOTS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Jarboe-Lackey Feedlots, Inc., hereby petitions for issuance of a writ of certiorari to review the decision and judgment of the Court of Appeals for the Tenth Circuit in *United States* v. *2,116 Boxes of Boned Beef,* No. 82-1537, issued on January 23, 1984.

OPINIONS BELOW

The decision of the Court of Appeals (Pet. App. A., pp. 1a-20a, *infra*) is reported at 726 F.2d 1481. The Orders of the District Court of February 17, 1982 and March 5, 1982 on the attorneys' fee question at issue in this petition (Pet. App. B, pp. 21a-22a, *infra*) were not reported although

the District Court's ruling on the underlying litigation is reported at 516 F. Supp. 321 (Pet. App. C, pp. 23a-89a, *infra*).

JURISDICTION

The decision of the Court of Appeals was issued on January 23, 1984, and that court denied a timely motion for rehearing and suggestion for rehearing en banc on February 23, 1984 (Pet. App. D, p. 90a-91a, *infra*). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 204(a) of the Equal Access to Justice Act, 28 U.S.C. §2412(d) is reproduced in Appendix E, pp. 92a-95a *infra*.

STATEMENT

The Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d), allows small businesses, nonprofit organizations and individuals of modest means to recover their attorneys' fees when they prevail in civil litigation with the federal government if the "position of the United States" was not "substantially justified." The lower courts have struggled with two critical questions under this statute: (i) What is the "position of the United States"? (ii) What is the meaning of the "substantial justification" standard?

In answering those questions the courts have divided sharply. This case provides an opportunity for this Court to resolve those conflicting decisions by the lower courts. Also at issue is petitioner's right to present evidence in support of a claim for fees.

Petitioner's claim for attorneys' fees derives from the seizure on April 17, 1980 by the United States Department of Agriculture of 273 beef carcasses and offal belonging to petitioner. The seizure was based on the allegation that the beef had been adulterated by the implantation of diesthylstilbestrol (DES) on or about November 21, 1979, less than three weeks after the federal government had withdrawn its 25-year approval of the use of DES implants to promote cattle growth. *See* 44 Fed. Reg. 54852 (1979).

A. The Trial in District Court

On May 14, 1980, the United States filed a seizure action against petitioner's beef in the United States District Court for the District of Kansas, claiming the meat was adulterated under the Federal Meat Inspection Act, 21 U.S.C. §601(m). The trial lasted for five weeks, from October 20, 1980 until November 25, 1980. The government presented its case through ten scientists and petitioner countered with four experts in biochemistry, pharmacology, veterinary medicine and related disciplines.

In a lengthy opinion released on May 7, 1981, the District Court dismissed the government's claim that petitioner's beef was adulterated. Pet. App. C. After carefully reviewing the testimony of each witness, the Court concluded that the government's action "to deem the detained red meat and offal adulterated because of the possible presence of DES residue is arbitrary and does not comport with due process." *Id.*, p. 77a.

The District Court emphasized that the government in the past "has acquiesced in the slaughter and distribution of DES implanted beef." *Id.*, p. 86a. The District Court accepted expert testimony that the 154,000 pounds of beef

seized by the government contained a grand total of only 1.088 *milligrams* of DES. Pet. App. C, pp. 65a-66a. In contrast, the Court observed that "the consuming public, *i.e.*, approximately 200 million people, have daily and continuously consumed beef of DES-implanted cattle for a period of approximately 25 years without a single report of a carcinogenic effect." Pet. App. C, p. 33a.[1]

The District Court concluded that the government's action against petitioner's beef "makes no sense at all" and was "irrational." *Id.*, pp. 85a, 86a.

> Simply stated, it is the Court's view that when an administrative opinion is geared to wholly unfounded bases of fact, none of which can be reasonably established, it makes no sense at all. Such conduct is arbitrary and irrational and is most deserving of the Court's review. This is such a case.

The Court ordered the beef released to petitioner and assessed court costs against the government, including the cost of storing the beef. The District Court reserved the question of petitioner's entitlement to attorneys' fees. The United States appealed to the Tenth Circuit, but that court granted petitioner's motion to dismiss the appeal for lack

---

[1]These statistics contrast sharply with the government's current policy allowing ingestion of DES as a postcoital contraceptive. The Food and Drug Administration has approved the ingestion by an individual of 250 milligrams of DES over a five-day period in those cases, stating: "There is at present no positive evidence that the restricted use of diethylstilbestrol for postcoital contraceptive carries a significant carcinogenic risk either to the mother or the fetus." 21 C.F.R. §310.50(b) (1983). Yet in this case the total volume of DES in petitioner's meat was 0.4 percent of that 250 milligrams, and was distributed over 154,000 pounds of beef.

of finality and remanded for decision of the attorneys' fee issue. Slip Opinion, Nov. 3, 1981 (Pet. App. F, pp. 96a-98a, *infra*).

B. The Claim For Attorneys' Fees In The District Court

On remand, both parties briefed the attorneys' fee question and petitioner attempted to press a counterclaim for the loss in value of the beef during the litigation.[2] Under the EAJA, the government has to pay petitioner's attorneys' fees unless it establishes that the "position of the United States" in the seizure action was "substantially justified." 28 U.S.C. §2412(d). At a hearing on February 8, 1982, the District Court repeated its view that the government's position during the lawsuit was "arbitrary" and "made no sense at all." Transcript of Oral Argument, Pet. App. G, *infra,* pp. 99a-103a.

The District Court held that in order to avoid a fee award under the Equal Access to Justice Act, the government had to show only that its position had been reasonable. "The test of whether or not a Government action is substantially justified is essentially one of reasonableness." *See id,* p. 100a. Despite its previous statements that the government's position was arbitrary, irrational and made no sense at all, the Court then concluded, somehow, that no fees should be awarded because the government's position had been "reasonable." *Id.,* at p. 101a.

---

[2]This counterclaim was unsuccessful in both the District Court and the Court of Appeals, and is not presented in this Petition. A claim for this loss recently has been lodged with the United States Claims Court. *Jarboe-Lackey Feedlots, Inc.* v. *United States,* No. 233-84 C.

The District Court entered an order denying the fee application on February 17, 1982, and rejected petitioner's motion for reconsideration on March 5, 1982. Pet. App. B, pp. 21a-22a, *infra*.

C. Petitioner's Proffered Evidence

At the fee award hearing on February 8, 1982, the District Court refused to receive petitioner's proffer of evidence on the government's bad faith in proceeding with the seizure action, which also was directly relevant to the substantial justification question. Pet. App. G, pp. 102a-103a. The proffered evidence was a memorandum dated August 29, 1980 from the United States Attorney for the District of Kansas, James B. Buchele, to the Department of Agriculture, his client in the seizure action. *See* Pet. App. H, pp. 104a-109a, *infra*.

In the memorandum, Mr. Buchele urged his client to drop the seizure action. Mr. Buchele stated that he was "personally unconvinced that our evidence meets the standard" for seizure under the Meat Inspection Act. *Id.*, p. 105a. With some prescience he observed that "had we proceeded to trial last week, we would have lost." *Id.*

Mr. Buchele emphasized the inconsistency of seizing petitioner's beef when millions of tons of DES-treated beef has been consumed by the American public over the last 25 years. "The [government's] actions (or inaction) in this regard makes the court and me, frankly, wonder how serious the government's position really is and why one individual is to be penalized to this extent in the face of [the government's] inconsistent conduct." *Id.*, p. 107a.

After noting that he has presented unpopular or difficult legal arguments on behalf of clients in the past, Mr.

Buchele concluded: "I have never before, however, lacked the personal enthusiasm for my client's position on the facts or enforcement discretion as I do here." *Id.*, p. 108a.

D. The Court of Appeals' Decision

The government appealed the District Court's decision on the merits of the seizure action and petitioner cross-appealed on the denial of attorneys' fees. On August 12, 1982, the Court of Appeals granted the government's motion to dismiss its own appeal (Pet. App. I, p. 110a, *infra*).

The Court of Appeals affirmed the attorneys' fees rulings in an opinion announced on February 6, 1984. It noted first that the Equal Access to Justice Act (EAJA) was enacted "to relieve victims of abusive governmental conduct and to expose more governmental action to adversarial testing by encouraging private parties to challenge U.S. behavior." Pet. App. A, p. 6a.

The Court of Appeals adopted the District Court's view that under the EAJA "test of substantial justification is essentially one of reasonableness in both law and fact." *Id.*, p. 9a. The court acknowledged, though, that there is "considerable disagreement about *which* government position must be justified." *Id.*, p. 10a (emphasis in original).

Without much discussion of that question, the Court of Appeals adopted the view of the D.C. Circuit in *Spencer* v. *NLRB*, 712 F.2d 539 (D.C. Cir. 1983), *cert. denied*, 52 U.S.L.W. 3756 (Apr. 17, 1984), that only the government's litigation position should be considered in making the EAJA fee decision. The court's scrutiny, therefore, did not reach the government actions which precipitated the lawsuit. *Id.*, p. 11a.

Because the Court of Appeals reviewed the denial of fees under the "clearly erroneous" standard, the question it asked was: Should the District Court's conclusion – that the government's litigation position was reasonable – be reversed as clearly erroneous? In answering that question, the Court of Appeals cited several "facts" as support for its affirmance of the denial of fees (Pet. App. A, p. 12a):

> [T]hat as of April 1980 Jarboe-Lackey cattle had been illegally implanted with DES after its legal deadline; that the DES implants were prominent and palpable in the cattle's ears at the time of slaughter; that there was an ongoing DES ban; that the enforcement division of the agency had published scientific treatises suggesting that tissue residue persisted in implanted cattle; and finally, that DES was a known carcinogen in humans and animals.

As explained below, however, those factual points are not relevant to the legal issues in the seizure action, and are inconsistent with the District Court's findings on the merits. *See* pp. 15-17, *infra.* The Court of Appeals, however, concluded that these findings provided sufficient support for the District Court's denial of fees on the ground that the government's litigation position had "a reasonable basis in both fact and in law." Pet. App. A, p. 13a.

Finally, the Court of Appeals also affirmed the District Court's refusal to receive any evidence on petitioner's fee application. The Tenth Circuit noted that its decision on this point conflicts with the Ninth Circuit's ruling in *McQuiston* v. *Marsh,* 707 F.2d 1082 (9th Cir. 1983), but con-

cluded that the District Court's procedure had not "prejudiced" petitioner. Pet. App. A, p. 15a.[3]

The Court of Appeals on February 23, 1984 denied a motion for rehearing and suggestion for rehearing en banc (Pet. App. D, pp. 90a-91a, *infra*) and this petition followed.

REASONS FOR GRANTING THE WRIT

The goals of the Equal Access to Justice Act (EAJA) are both clear and ambitious. A primary goal is fairness. By allowing the award of attorneys' fees to litigants with limited resources, Congress hoped the Act would "plac[e] the Federal government and civil litigants on a completely equal footing." H. Rep. No. 1434, 96th Cong., 2d Sess. 25 (1980).

Another premise of the Act is that small private parties often cannot effectively resist the federal government even when the government actions are wrong. The EAJA thus aims to improve government by making it easier for small private parties to oppose wrongful federal actions. As one of the Act's sponsors stated, the law was designed to "make the bureaucracy more accountable in the exercise of its regulatory powers and more responsive to the needs of citizens." 126 Cong. Rec. S 13690 (Sept. 26, 1980) (remarks of Sen. DeConcini).

The decision of the Court of Appeals obstructs the achievement of these goals by distorting the meaning of the statute in three critical respects.

---

[3]Other issues resolved by the Court of Appeals but not presented in this petition include a claim for fees under the "bad faith" exception to the American Rule and petitioner's claim for recoupment of the diminished value of the beef when it finally was returned.

First, the Court of Appeals held that it need consider only the government's litigation position, not the government action which caused the lawsuit, to determine if the "position of the United States" was "substantially justified." Thus, the Court of Appeals transformed its inquiry from whether the government was substantially justified in *taking* certain action to whether it was substantially justified in *defending* those actions. That narrowing of focus is contrary to Congress's stated purpose and has been rejected by numerous other courts.

Second, the Court of Appeals ruled that the substantial justification standard is one of reasonableness. As other courts have held, though, Congess specifically rejected a reasonableness standard as too weak and adopted the substantial justification test to increase the government's burden in opposing an EAJA fee application. This case presents the opportunity for this Court to resolve this conflict among the lower courts, as well.

Third, the Court of Appeals refused to order an evidentiary hearing on petitioner's fee application, in direct conflict with the Ninth Circuit's ruling in *McQuiston* v. *Marsh, supra.*[4]

---

[4]The statutory provision at issue in this case, 28 U.S.C. §2412(d)(1)(A), is scheduled to "sunset" on October 1, 1984. Pending legislation in Congress would extend the statute indefinitely. *See* S. 919, 98th Cong., 2d Sess. (1984); H.R. 5479, 98th Cong., 2d Sess. (1984). That legislation has support from Republicans, Democrats and the Administration and is virtually certain to be enacted. Accordingly, this Court should address the conflicting interpretations by the courts of §2412(d)(1)(A).

I.

THE "POSITION OF THE UNITED STATES" INCLUDES THE UNDERLYING GOVERNMENT ACTION LEADING TO THE LITIGATION

The conflict among the lower courts on the meaning of "position of the United States" is intense and shows no sign of abating. The Courts of Appeals for the Fourth, Federal, and District of Columbia Circuits have adopted the narrow definition embraced by the Tenth Circuit in this case.[5] The Third and Ninth Circuits have adopted the broader reading which petitioner urges, holding that the courts must consider the underlying agency action in order to determine whether the government's position was substantially justified.[6] The Second and Eighth Circuits have noted the problem but reserved judgment on the question[7] while the District Courts have shown a similar diversity of opinion on the subject.[8]

The judicial cacophony is somewhat surprising in view of the strong support for the broad definition of "position

[5] *See Tyler Business Services, Inc.* v. *NLRB,* 695 F.2d 73, 75 (4th Cir. 1982); *Broad Avenue Laundry & Tailoring* v. *United States,* 693 F.2d 1387, 1390-91 (Fed. Cir. 1982); *Spencer* v. *NLRB, supra.*

[6] *Natural Resources Defense Council* v. *EPA,* 703 F.2d 700, 707-12 (3d Cir. 1983); *Rawlings* v. *Heckler,* 725 F.2d 1192, 1195-96 (9th Cir. 1984); *Wolverton* v. *Schweiker,* 726 F.2d 580, 583 (9th Cir. 1984).

[7] *Environmental Defense Fund* v. *Watt,* 722 F.2d 1081, 1084-85 (2d Cir. 1983); *Cornella* v. *Schweiker,* 728 F.2d 978, 982-83 (8th Cir. 1984).

[8] *Compare Moats* v. *United States,* 576 F. Supp. 1537, 1541 (W.D. Mo. 1984) (underlying action); *Ashburn* v. *United States,* 577 F. Supp. 59, 65 (N.D. Ala. 1983) (same); *Environmental Defense Fund* v. *Watt,* 554 F.Supp. 36, 40-41 (E.D.N.Y. 1982), *aff'd on other grounds,* 722 F.2d 1081 (2d Cir. 1983); *Moholland* v. *Schweiker,* 546 F. Supp. 383, 386 (D.N.H. 1982) (same), *with Citizens for Responsible Resource Development* v. *Watt,* 579 F. Supp. 431, 447 (M.D. Ala. 1984) (litigation position); *Grand Boulevard Improvement Ass'n* v. *City of Chicago,* 533 F. Supp. 1154, 1162-63 (N.D. Ill. 1982) (same); *Operating Engineers Local Union No. 3* v. *Bohn,* 541 F. Supp. 486, 495-96 (D. Utah 1982) (same).

of the United States" in both the statute and the legislative history. Notably, the EAJA defines "United States" to refer to "any agency and any official of the United States acting in his or her official capacity." 28 U.S.C. §2412(d)(2)(C). By including in that term all federal officials – including those with no responsibility for taking litigation positions on behalf of the government – Congress plainly established that the "position of the *United States*" includes government actions outside of litigation. (Emphasis added.)

This conclusion is reinforced by comparing §2412(d)(1)(A) with the EAJA provision covering court review of agency adjudications, §2412(d)(3). The latter provision authorizes courts to award fees incurred in previous agency proceedings unless the court finds that "*during such adversary adjudication* the position of the United States was substantially justified, or that special circumstances make an award unjust." (Emphasis added). Since §2412(d)(1)(A) does not limit "position of the United States" with a phrase like "during such adversary adjudication," plainly Congress intended that the review of the position of the United States under §2412(d)(1)(A) include the underlying agency action. *See Lankford* v. *Law Enforcement Assistance Admin.*, 620 F.2d 35, 36 (4th Cir. 1980) ("clear use of different terminology within a body of legislation is evidence of an intentional differentiation"). Congress certainly knew how to confine "position of the United States" to the government's litigation positions, and did so explicitly in §2412(d)(3). But Congress did not impose such a limitation in §2412(d)(1)(A).

Even those Courts adopting a narrow view of "position of the United States" have conceded that much of the legislative history of the EAJA supports the full interpretation which we urge. As the D.C. Circuit noted in

Spencer v. *NLRB, supra,* 712 F.2d at 548:

> The legislative history is, however, rife with arguments that take for granted one or the other option. Unfortunately, the number that seem founded on the "underlying action" theory is roughly the same as the number that seem founded on the "litigation position" theory.

The *Spencer* Court and the Tenth Circuit in this case, however, failed to recognize the significance of the fact that in enacting the EAJA Congress apparently did not distinguish between the government's underlying actions and its litigation position.

The draftsmen, supporters, and opponents of the EAJA did not differentiate between the underlying actions of the government and its litigation position for one simple reason: all of those considering the proposed Act understood it to apply to *either* the government's underlying actions or its litigation positions. The interchangeable legislative references to the two possible definitions thus are properly viewed not as the result of confusion among the lawmakers, but rather as reflecting the universal understanding that fees under the EAJA should be available for resisting unjustified agency actions and for resisting unjustified government litigation positions.[9]

---

[9]This conclusion is strongly reinforced by the remarks of Rep. Kastenmeier, a prominent sponsor of the EAJA in 1980, at recent congressional hearings on modifications to the Act (*see* Pet. App. J, pp. 111a-113a):

> I would like to emphasize that when the escape clause was originally written, allowing the United States to escape liability when it demonstrated the position was substantially justified, it was understood that the position of the United States was not limited to the Government's litigation position but included the underlying action, including agency action which led to the litigation.

Only this full construction of the position of the United States realizes the Act's remedial purpose. As Judge Gibbons wrote for the Third Circuit in *Natural Resources Defense Council, Inc.* v. *EPA, supra,* 703 F.2d at 706-707, the "litigation position" approach "means that no matter how outrageously improper the agency action has been, and no matter how intransigently a wrong position has been maintained prior to litigation, and no matter how often the same agency repeats the offending conduct, the statute has no application, so long as employees of the Justice Department act reasonably when they appear before the court."

The Ninth Circuit in *Rawlings* v. *Heckler, supra,* took an eminently sensible view of this question (725 F.2d at 1195-96):

> The "uncertainty" of the legislative history supports the view that Congress intended to include both the underlying action and the government's litigation posture within the term position. *See Environmental Defense Fund, Inc.* v. *Watt,* 554 F. Supp. 36, 41 (E.D. N.Y. 1982). "If the government's litigation position was the sole consideration, then the government could insulate itself from any liability for attorneys' fees, no matter how unreasonable the action challenged, simply by conceding error or settling on reasonable terms after a suit has been filed." *Id.* We do not believe that Congress intended the courts to adopt this myopic view.[10]

[10]The D.C. Circuit's *Spencer* decision, which is the most prominent "litigation position" ruling and on which the Tenth Circuit relied, turned in large part on an extended academic speculation concerning five hypothetical fee award cases. 712 F.2d at 552-57. The inappropriateness of resolving an important legal question on the basis of unvarnished speculation is patent. Indeed, by relying on such hypothetical "analysis," *Spencer* persuasively establishes the weakness of the "litigation position" theory it espouses.

II.

TO BE SUBSTANTIALLY JUSTIFIED, THE GOVERNMENT'S POSITION MUST BE MORE THAN MERELY REASONABLE

The Tenth Circuit concluded that under the EAJA the government can satisfy the substantial justification standard so long as its position was reasonable "in both law and fact." Pet. App. A, p. 9a. In so ruling, the Court of Appeals adopted the interpretation of the key phrase, "substantially justified" which has been favored by many lower courts.[11]

Other courts, however, have recognized that Congress intended the substantial justification standard to establish a criterion stronger than mere reasonableness. As the D.C. Circuit observed in *Spencer,* "The Senate Judiciary Committee considered and rejected an amendment to the [proposed EAJA] that would have changed the pertinent language from "substantially justified' to 'reasonably justified.' " 712 F.2d at 558, citing S. Rep. No. 253, 96th Cong., 1st Sess. 1, 8 (1979). Based on that significant evidence, several other courts have agreed with the *Spencer* Court that substantially justified means more than just reasonable. *E.g., Nunes-Correia* v. *Haig,* 543 F. Supp. 812, 817 (D.D.C. 1982); *Wolverton* v. *Schweiker,* 533 F. Supp. 420, 424 (D. Idaho 1982), *aff'd in part and rev'd in part,* 726 F.2d 580 (9th Cir. 1984).

This conclusion is buttressed by the recent statement of Rep. Kastenmeier, a prominent sponsor of the EAJA in 1980, that when the law was first enacted (Pet. App. J, p. 113a)

---

[11] *See, e.g., Dougherty* v. *Lehman,* 711 F.2d 555 (3d Cir. 1983); *Foley Constr. Corp.* v. *U.S. Army Corps of Engineers,* 716 F.2d 1202, 1204 (8th Cir. 1983); *Wyandotte Savings Bank* v. *NLRB,* 682 F.2d 119, 120 (6th Cir. 1982).

> "[S]ubstantially justified" was not the same as "reasonable," a term that was rejected outright. Rather, the term required more than that the Government show it had merely acted reasonably.

Although this definitional question may seem relatively minor at first glance, the meaning of substantial justification is the lynch-pin of the entire statutory scheme. No private party can recover fees under §2412(d) unless the Court concludes that the government failed to meet the substantial justification standard.

The importance of this definition may be seen on a broad scale by looking at the experience under the EAJA since it took effect on October 1, 1981. When Congress debated the proposed law, the Congressional Budget Office projected $69 million in fee awards the first year, and awards exceeding $100 million per year thereafter. H. Rep. No. 1418, 96th Cong., 2d Sess. 21-22 (1980). The reality, however, has been far different. Only $2.4 million in fees were awarded in court cases in the first 21 months under the EAJA.[12] This low total is due in part to the erroneously weak construction of "substantially justified" which many court have adopted.

---

[12]Report by the Director of the Administrative Office of the United States Court On Requests For Fees and Expenses Under The Equal Access to Justice Act of 1980, July 1, 1982 through June 30, 1983. Less than $40,000 in EAJA fees were awarded in administrative proceedings during the first two years under the statute. Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act, Oct. 1, 1982 - September 30, 1983 (Dec. 30, 1983).

In this case, it is highly unlikely that any court would find the government's position – which the District Court ruled was "arbitrary" and "makes no sense at all" – was more than reasonable. For example, in this case the Tenth Circuit based its affirmance of the denial of fees on three factual findings (Pet. App. A, p. 12a): That petitioner's cattle had DES implants a few months after the date on which the government for the first time banned such implants; that some scientific treatises suggested that "tissue residue persisted in [DES] implanted cattle"; and that DES "was a known carcinogen in humans and animals."

These "facts," however, were of little or no relevance to the legal issue resolved in the District Court trial – whether DES-implanted beef was "adulterated" under the Meat Inspection Act. That DES survives in some form in the slaughtered cattle provides no particular guidance as to whether the remainder is sufficient to create a public health danger in individuals who eat the resulting beef. Unless such a danger is created, the meat cannot be considered "adulterated."

The District Court adopted petitioner's evidence that there was barely more than one milligram of DES in the entire 154,000 pounds of seized beef, although the government had permitted the consumption of millions of tons of beef from DES-implanted cattle over the preceding 25 years "without a single report of carcinogenic effect." *See* pp. 3-4, *supra*. Indeed, the government currently allows the ingestion of 250 milligrams of DES by a single individual as a postcoital contraceptive. *See* note 1, *supra*. That is the equivalent of eating more than 38 million pounds of beef with the same level of DES "adulteration" as the meat at issue in this case.

In these circumstances, the definition of substantially justified becomes critical. However difficult it is to think

of the government's "arbitrary" confiscation of petitioner's beef as "reasonable," it is impossible to characterize that illegal seizure as *more* than reasonable.

III.

PETITIONER IS ENTITLED TO PRESENT EVIDENCE ON ITS FEE APPLICATION

At the February 8, 1982 hearing on attorneys' fees, petitioner unsuccessfully sought to present evidence supporting its fee application, including the memorandum of Mr. Buchele, the U.S. Attorney who opposed the seizure action against petitioner's beef. *See* Pet. App. H, pp. 104a-109a, *infra*. The Tenth Circuit affirmed the District Court's refusal to hear petitioner's evidence, stating that petitioner had not been "prejudiced" because it could have submitted affidavits on the fee question. Pet. App. A, p. 15a.

In *McQuiston* v. *Marsh,* 707 F.2d 1082 (9th Cir. 1983), the Ninth Circuit came to the opposite conclusion, remanding for an evidentiary hearing on a factual dispute over the government's bad faith. *See Robinson* v.*Ritchie,* 646 F.2d 147, 149 (4th Cir. 1981) (same procedure in fee claim under common law.)

There must be a right to a fair hearing on a fee application. The District Court's refusal to receive even a proffer of petitioner's evidence was contrary both to the purposes of the EAJA and basic notions of due process of law. It is difficult to fathom the conclusion of the Court of Appeals that petitioner was not prejudiced by that refusal. Certainly on this record it would be appropriate to reverse the Court of Appeals summarily on this point.

At the very least, the availability of an evidentiary hearing on an EAJA fee application should not turn on which federal circuit court of appeals has jurisdiction over the case. In view of the directly contradictory holdings of the Ninth and Tenth Circuit on this basic question, a writ of certiorari should be granted.

CONCLUSION

The questions presented in this petition are the most critical legal issues growing out of the Equal Access to Justice Act, and are questions on which the lower courts have disagreed irreconcilably. To resolve those disagreements and to ensure the fullest possible realization of the Act's goals, a writ of certiorari should be granted and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

DAVID O. STEWART
(Counsel of Record)
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorney for Petitioner

Of Counsel:

CHARLES D. McATEE
ANNE L. BAKER
EIDSON, LEWIS, PORTER & HAYNES
1300 Merchants National Bank Bldg.
Topeka, KS 66612
(913) 233-2332

Date: May 23, 1984

CERTIFICATE OF SERVICE

I, David O. Stewart, do hereby certify that I have caused three copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to be served by first class, postage pre-paid mail on May 23, 1984 on:

Rex E. Lee
Solicitor General
U.S. Department of Justice
9th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

A copy of the foregoing Petition for a Writ of Certiorari was also sent by first classs, postage pre-paid mail on May 23, 1984 to:

Edward T. Hand
Attorney, Appellate Section
Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530

DAVID O. STEWART

APPENDIX A

726 F.2d 1481

UNITED STATES of America,
Plaintiff-Appellee,
v.
2,116 BOXES OF BONED BEEF, WEIGHING APPROXIMATELY 154,121 POUNDS, and 541 Boxes of Offal Weighing Approximately 17,732 Pounds,
Defendants-Appellants.

Jarboe Lackey Feedlots, Inc.,
Claimant-Appellant.
No. 82-1537.

United States Court of Appeals,
Tenth Circuit.

Jan. 23, 1984.
Rehearing Denied Feb. 23, 1984.

Before HOLLOWAY and LOGAN, Circuit Judges, and ARRAJ, District Judge.*

ARRAJ, District Judge.

This is an appeal from a condemnation action brought by the United States pursuant to the Meat Inspection Act, 21 U.S.C. §§ 601-695, alleging adulteration of certain beef and offal owned by Jarboe-Lackey Feedlots, Inc. Following an extensive trial, the district court concluded that the government had failed to meet its burden of proving adulteration, 21 U.S.C. § 601(m)(1), (m)(2)(A), and (m)(3), and dismissed the libel action. The trial court later denied Jarboe-Lackey's petition for attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (Supp.1983), finding that the Government's position was

*Honorable Alfred A. Arraj, United States District Judge of the District of Colorado, sitting by designation.

"substantially justified" and that the United States had acted in good faith.

Appellant raises numerous issues on appeal. Foremost among them is claimant's request for attorneys' fees under the EAJA. First, however, we must determine whether the district court had jurisdiction over the seizure action. The remaining portion of the discussion will address appellant's contentions that the trial court erred when it: 1) found that claimant had illegally implanted steers; and 2) denied claimant's motion for recoupment and counterclaim for recoupment. We reject appellant's arguments and affirm the trial court's rulings and findings.

I

Based upon new scientific evidence that the use of diethylstilbestrol (DES) as a growth promotant in animals leaves potentially carcinogenic residues in edible portions of meat, the Food and Drug Administration (FDA) withdrew its approval of New Animal Drug Applications (NADA's) for use of DES in feed and implants in 1979. 44 Fed.Reg. 54852 (Corrected copy of Commissioner's order, September 21, 1979). *See Rhone-Poulenc, Inc., Hess & Clark Div. v. FDA,* 636 F.2d 750 (D.C.Cir.1980) (Affirming the Commissioner's order). As a result, the marketing of meat and byproducts from animals treated with DES on or after November 1, 1979, was prohibited.[1] 44 Fed.Reg. 42679, 45618, 45764 (Deadline prohibiting use of DES implants was postponed from July 20, 1979, until November 1, 1979).

On April 17, 1980, the United States Department of Agriculture (USDA) seized 273 beef carcasses and offal

[1]The "explant program", 45 Fed.Reg. 26947 (April 22, 1980), however, permitted the marketing of "illegally implanted" meat and byproducts under special and limited conditions.

belonging to Jarboe-Lackey, after observing recently implanted DES pellets in the ears of appellant's cattle. Seven ears were randomly removed and subjected to laboratory testing; the results confirmed that the DES content of the pellets was high enough to leave residue in the meat.

On May 14, 1980, the United States filed a seizure action against the meat, charging that it was adulterated within the meaning of the Federal Meat Inspection Act, 21 U.S.C. § 601(m).[2] A complicated trial to the court culminated in an opinion and order dated May 7, 1981. 516 F.Supp. 321 (D.Kan.1981). The district court found that Jarboe-Lackey had implanted animals with DES on or after November 1, 1979, *Id.* at 322-23, and that DES is harmful and deleterious within the meaning of Section 601(m). *Id.* at 325, 335. But the government failed to prove that the beef was adulterated as defined by Sections 601(m)(1), (m)(2)(A) and (m)(3). Specifically, the United States failed to establish that there was a reasonable possibility that the amount of DES in the beef would be harmful. 21 U.S.C. § 601(m)(1). And as the district court caustically pointed out, "there were no regulations of the Department of Agriculture in force . . . through which the Secretary (had) exercised his discretion and determined that DES was a harmful or deleterious substance within

[2]Section 601(m) provides in pertinent part that meat is adulterated

(1) if it bears or contains any poisonous or deleterious substance which may render it injurious to health. . .

(2)(A) if it bears or contains (by reason of administration of any substance to the live animal or otherwise) any added poisonous or deleterious substance. . .which may, in the judgment of the Secretary, make such article unfit for human food; [or]

(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food;

the meaning of [Section] 601(m)(2)(A)." 516 F.Supp. at 344. Lastly, the court found no violation of Section 601(m)(3). *Id.* at 350.

The district court dismissed the complaint and ordered the taxation of court costs against the government, but declined to consider Jarboe-Lackey's request for attorneys' fees. Consequently, when both parties appealed, we dismissed for lack of finality and remanded the case with instructions to decide the attorneys' fees issue. (Slip Opinion, November 3, 1981). Appellants then filed a counterclaim for damages under 21 U.S.C. § 673, 28 U.S.C. § 2465 and the Federal Tort Claims Act, and requested costs and attorneys' fees under the EAJA, 28 U.S.C. § 2412(b), and § 2412(d)(1)(A). After briefing and oral argument, the court ruled on these matters as well as appellant's pending motion for recoupment of the loss in value of the meat. It denied Jarboe-Lackey's petition for fees under the EAJA because the position of the United States was "substantially justified" and there was no evidence of bad faith. Additionally, claimant's counterclaim and motion for recoupment were dismissed as "untimely and irrelevant".

II

Appellant maintains that the district court had no jurisdiction over the seizure action because the government's complaint was filed more than 20 days after the beef was initially detained. According to Jarboe-Lackey, the statute authorizing seizure of adulterated meat, 21 U.S.C.§ 673(a)[3] is limited by the statutory provision

[3]Section 673(a) provides that any adulterated meat:

> shall be liable to be proceeded against and seized and condemned, *at any time*, on a libel of information in the United States district court . . . within the jurisdiction of which the article or animal is found. (Emphasis added).

restricting the allowable detention period for adulterated beef. 21 U.S.C.§ 672[4]. Appellant reasons that to construe the former statute otherwise would violate the claimant's due process rights.

We do not find this interpretation persuasive. "[W]hile it is true that § 672 limits the right of the government to physically detain beyond the maximum of twenty days, nowhere in the provisions of § 673 is the twenty day period of § 672 mentioned as a time limitation upon the filing of a libel action." *United States v. 2623 Pounds, More or Less, of Veal & Beef*, 336 F.Supp. 140, 144 (N.D. Cal.1971). Indeed, the express language of § 673 provides that a judicial proceeding may be instituted "at any time," against an adulterated meat food product. *Id.* This leads us to conclude that the 20 day period of § 672 is not a jurisdictional prerequisite to a libel action under § 673. *See, 2623 Pounds, supra* at 145.

To be sure, the owner of seized meat is entitled to its return at the end of the 20 day period in the absence of government action.[5] 21 U.S.C. *8* 672. The claimant can accomplish this through a proceeding in the nature of mandamus or replevin. 336 F.Supp. at 145. But the owner's right extends no further. Jarboe-Lackey may not

---

[4]Section 672 provides in relevant part:

> Whenever any carcass . . . or meat food product of cattle . . . is found by any authorized representative of the Secretary upon any premises where it is held for purposes of, or during or after distribution in, commerce . . . and there is reason to believe that such article is adulterated . . . and is capable of use as human food . . . it may be detained by such representative for a period not to exceed 20 days, pending action under Section 673 of this title . . ..

[5]We note that in the present case, Jarboe-Lackey apparently failed to ask the USDA to return the detained meat.

challenge the district court's jurisdiction over the seizure action merely because the United States failed to comply with § 672's 20 day detention period. Accordingly, we affirm the trial court's ruling denying claimant's motion to dismiss for lack of jurisdiction.

III

Jarboe-Lackey seeks an award of attorneys' fees and expenses under the Equal Access to Justice Act. 28 U.S.C. § 2412 (Supp.1983). The EAJA, enacted in 1980, is designed to "diminish the deterrent effect of seeking review of defending against governmental action." H.R.Rep. No. 1418, 96th Cong., 2d Sess. 12 (1980), U.S. Code Cong. & Admin.News 1980, p. 4953. Impecunious parties are often reluctant to challenge unreasonable governmental action because of the cost involved in vindicating their rights. Congress also hoped to relieve victims of abusive governmental conduct and to expose more govenmental action to adversarial testing by encouraging private parties to challenge U.S. behavior. *Spencer v. NLRB,* 712 F.2d 539, 550 (D.C.Cir.1983).

Claimant's petition is based upon two provisions of the EAJA. Section 2412(d)(1)(A) provides that a court *shall* award an eligible prevailing party attorneys' fees and other litigation expenses unless some other statute specifically provides otherwise or "the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[6] This is an experi-

[6]The full text of § 2412(d)(1)(A) reads:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any

mental portion of the Act which will be automatically repealed by its "sunset provision" if it is not reenacted before October 1, 1984.[7] Meanwhile, however, courts have struggled with its ambiguous phrases and muddled legislative history.

Jarboe-Lackey also claims entitlement to fees under Section 2412(b). It makes the United States liable for attorneys' fees "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award."[8] This section codifies several important exceptions to the general "American Rule"[9] and thereby allows recovery of attorneys' fees when a losing party has "acted

---

costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the government was substantially justified or that special circumstances make an award unjust.

[7]Pub.L. No. 96-481, § 204(c), 94 Stat. 2321, 2329 (1980) (codified at 28 U.S.C.§ 2412 note (Supp. V. 1981)).

[8]The full text of § 2412(b) reads:

Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to [§ 2412(a)], to the prevailing party in any civil action brought by or against the United States or any agency and any official of the U.S. acting in his/her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

[9]The American rule bars prevailing litigants from receiving attorneys' fees from the losing party. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975).

in bad faith, vexatiously, wantonly or for oppressive reasons."[10] *Fitzgerald v. Hampton,* 545 F.Supp. 53, 56 (D.D.C.1982); *see also Spencer, supra* at 545.

A. Scope of Review

A trial judge's ruling on an EAJA application is to be modified by an appellate court only when there is a showing of abuse of discretion. *Matthews v. United States,* 713 F.2d 677, 682 (11th Cir.1983); *Hoang Ha v. Schweiker,* 707 F.2d 1104, 1105 (9th Cir.1983); *Foster v. Tourtellotte,* 704 F.2d 1109, 1110 (9th Cir.1983); *Knights of the KKK v. East Baton Rouge Parish School Board,* 679 F.2d 64, 69 (5th Cir.1982). Under this standard of review, the district court's conclusions of law are reviewable on a *de novo* basis, *Spencer, supra* at 563-564, and its findings of fact are to be reversed only if "clearly erroneous". Fed.R. Civ.P. 52(a). And "to the extent that trial judges' rulings regarding strength of positions taken in litigation by the United States are based upon assessments of the probative value of the evidence offered by the government, they should be reversed only if 'clearly erroneous' ". *Spencer, supra* at 564. The Supreme Court has defined a finding as "clearly erroneous":

> When although there is evidence to support it, the reviewing court on the entire evidence is left

---

[10]Attorneys' fees may also be recovered under two additional exceptions:

> i. When a party has conferred a common benefit by recovering a fund or property; and
>
> ii. When a party has willfully disobeyed a court order. *Fitzgerald, supra* at 56.

with the definite and firm belief that a mistake has been committed. *United States v. Gypsum Co.*, 333 U.S. 364, 394-395 [68 S.Ct. 525, 541-542, 92 L.Ed. 746] (1948); *Milgo Electronic Corp. v. United Business Communications, Inc.*, 623 F.2d 645, 662 (10th Cir.), *cert. denied*, 449 U.S. 1066 [101 S.Ct. 794, 66 L.Ed.2d 611] (1980).

B. Section 2412(d)(1)(A)

Jarboe-Lackey contends that the trial court erred when it denied claimant's request for attorneys' fees and costs under § 2412(d)(1)(A) because the position of the United States was not "substantially justified." The law is clear that the test of substantial justification is essentially one of reasonableness in both law and fact.[11] H.R. Rep. No. 1418, 96th Cong. 2d Session, p. 10-11 (1980), U.S.Code Cong. & Admin. News 1980, p. 4989-90; *Foley Construction Co. v. U.S. Army Corps of Engineers*, 716 F.2d 1202, 1204 (8th Cir.1983); *see also Flow Boy, Inc. and Tradewinds Industries, Inc. v. United States*, Nos. 82-1823, 82-1828, 82-1965 and 82-1966, slip op. (10th Cir. January 20, 1984); *Dougherty v. Lehman*, 711 F.2d 555 (3rd Cir. 1983); *Foster, supra* at 1112; *Broad Avenue Laundry &*

[11]In "borderline cases", courts look to several criteria to determine whether the government's position was substantially justified: the clarity of the governing law; the foreseeable length and complexity of the litigation; and the consistency of the government's position. *Spencer, supra* at 559-561. Here, however, a standard of reasonableness is adequate and appropriate.

Tailoring v. United States, 693 F.2d 1387, 1391 (Fed. Cir.1982); *Wyandotte Savings Bank v. NLRB,* 682 F.2d 119, 120 (6th Cir. 1982). *S & H Riggers & Erectors, Inc. v. OSHRC,* 672 F.2d 426, 429-430 (5th Cir. 1982). The government must therefore show that there is a reasonable basis in truth for the facts alleged in the pleadings; that there exists a reasonable basis in law for the theory it propounds; and that the facts alleged will reasonably support the legal theory advanced. *Dougherty v. Lehman, supra* at 564.

> The [substantial justification] standard, however, should not be read to raise a presumption that the Government position was not substantially justified. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing.
> H.R.Rep. No. 1418, 96th Cong. 2d Sess. 10-11 (1980), U.S.Code Cong. & Admin. News 1980, p. 4989-90.

While there is little debate about the meaning of "substantial justification", there is considerable disagreement about *which* government position must be justified. *See, e.g., Foley, supra* at 1204; *Spencer, supra* at 546; *Natural Resources Defense Council, Inc. v. USEPA,* 703 F.2d 700, 707 (3rd Cir.1983); *Kay Manufacturing Co. v. United States,* 699 F.2d 1376, 1379 (Fed.Cir.1983); *Gava v. United States,* 699 F.2d 1367, 1370 (Fed. Cir.1983); *S & H Riggers, supra* at 430-431. Some courts have concluded that the government position referred to in § 2412(d)(a)(A) is the litigation position. *See, Spencer, supra* at 557; *Kay Mfg., supra; Gava, supra; Tyler Business Services, Inc. v. NLRB,* 695 F.2d 73, 75 (4th Cir.1982); *Broad Ave, supra* at 1390; *S & H Riggers, supra* at 430-431; *Operating*

Engineers Local U. No. 3 v. Bohn, 541 F.Supp. 486, 494 (D.Utah 1982). Other courts have held that it refers to the agency action which made it necessary for a party to file suit. *Natural Resources Defense Council v. USEPA, supra* at 707; *EDF v. Watt,* 554 F.Supp. 36, 40-41 (E.D.N.Y. 1982). Yet in many cases "it makes no functional difference how one conceives of the government's 'position' because the litigation position of the United States will almost always be that its underlying action was legally justifiable." *Foley, supra* at 1204, *quoting Spencer, supra* at 551-552.

We agree with the well-reasoned conclusion of the District of Columbia Court of Appeals in *Spencer, supra,* that when the position of the United States does make a difference, "it seems more sensible and consistent with the purposes of the EAJA to interpret the phrase as the stance taken by the United States in litigation than to interpret it as the governmental behavior that precipitated the suit." *Id.* at 556. We therefore hold that the position of the United States, for purposes of this Act, means the arguments relied upon by the government in litigation.

Jarboe-Lackey maintains that the trial court's Memorandum and Decision of May 7, 1981, 516 F.Supp. 321 (D.Kans.1981), holding that the United States failed to meet its burden of establishing adulterated beef and offal, is inconsistent with the court's refusal to award claimant attorneys' fees under Section 2412(d)(1)(A). Appellant argues that not only did the district court rule in its favor on the merits of the case, but that it did so with such objurgatory remarks about the government's evidence that one is compelled to conclude that attorneys' fees are appropriate. Claimant cites as one example the court's characterization of the Secretary of Agriculture's § 601(m)(2)(A) order — finding meat of DES implanted steers adulterated

— as arbitrary, capricious and irrational because there was no actual notice given. This language, coupled with similar comments about proof of adulteration, leads Jarboe-Lackey to conclude that the government's position was not substantially justified. We disagree.

While Judge Kelly's May 7, 1981, opinion does include several critical comments about the government's shortcomings in establishing adulteration under 21 U.S.C. § 601, it cannot be read alone. Rather, it must be viewed in the context of the district court's later ruling and specific findings regarding claimant's application for fees; for it was only in the latter proceeding that the government's litigation position was subjected to the test of reasonableness in fact and law.

On March 3, 1982, the district court heard oral argument on Jarboe-Lackey's petition for attorneys' fees under the EAJA. In its ruling at the close of the hearing, the court expressly held that the filing of the seizure action by the United States was substantially justified. Specifically, it found that as of April 1980 Jarboe-Lackey cattle had been illegally implanted with DES after its legal deadline; that the DES implants were prominent and palpable in the cattle's ears at the time of slaughter; that there was an ongoing DES ban; that the enforcement division of the agency had published scientific treatises suggesting that tissue residue persisted in implanted cattle; and finally, that DES was a known carcinogen in humans and animals. Based upon these findings, the court noted that it was not unreasonable for the government representative to conclude that unless the beef and offal were seized, implanted meat would be introduced into commerce; and indeed, "the Government had every right if not the duty, to proceed with the seizure action."

We find that district court did not err in holding that the

government's position was substantially justified because there was a reasonable basis in both fact and in law. The fact that the government lost the case does not give rise to a presumption that its position was not substantially justified; nor does the loss coupled with the court's critical comments establish entitlement to fees. Because the U.S. has shown that its litigation position was substantially justified, Jarboe-Lackey is not entitled to fees under § 2412(d)(1)(A).

C. Section 2412(b)

Appellant also contends that the court erred in finding that Jarboe-Lackey was not entitled to fees under the codified "bad faith" exception to the American Rule. 28 U.S.C. § 2412(b). In contrast to Section 2412(d)(1)(A), the law is unambiguous regarding what must be shown to justify an award of fees under this provision. This is because there is a well-developed body of caselaw which defines the contours of the now — "codified exceptions."

An award of attorneys' fees under the "bad faith" exception to the American rule "is punitive, and the penalty can be imposed 'only in exceptional cases and for dominating reasons of justice.' " *United States v. Standard Oil Co. of California,* 603 F.2d 100, 103 (9th Cir.1979) (quoting 6 J. Moore, Federal Practice, § 54.77[2] pp. 1709-1710 (2d ed.)); *see Cornwall v. Robinson,* 654 F.2d 685, 687 (10th Cir.1981). It requires more than a showing of a weak or legally inadequate case, *Americana Industries, Inc. v. Wometco de Puerto Rico, Inc.,* 556 F.2d 625, 628 (1st Cir.1979); *see Cornwall, supra* at 687; *Schmidt v. Natl. Organization for Women,* 562 F.Supp. 210, 215 (N.D.Fla. 1983); and "[t]he exception is not invoked by findings of negligence, frivolity, or improvidence." *Cornwall, supra* at 687. To be sure, this is an extremely narrow exception under which a trial court may award attorneys' fees.

Finally, it is important to note that the awarding of attorneys' fees under the "bad faith" exception is committed to the discretion of the district court and will be reversed only when there is a showing of abuse of discretion. *Ryan v. Hatfield,* 578 F.2d 275, 277 (10th Cir.1978).

Appellants have failed to persuade this court that the government acted in bad faith and that the trial court's ruling was an abuse of discretion. We therefore affirm the court's specific finding that there was "no evidence that the government acted in bad faith in either the filing or preparation of this case."

D. Evidentiary Hearing

The final EAJA question before us involves Jarboe-Lackey's request for an evidentiary hearing or to proffer evidence on the issues of substantial justification and bad faith. Appellant urges this Court to issue an order directing the district court to hold an evidentiary hearing on these issues because the law purportedly requires a court to grant a request for an evidentiary hearing when disputed facts determine the right to a fee award.

Neither the statutory language of the EAJA nor the caselaw supports Jarboe-Lackey's request. First, we observe that § 2412(d) does not require an evidentiary hearing before ruling on an EAJA application. There is also no mention or reference to a hearing requirement in the legislative history of Section 2412. Caselaw on the right to an evidentiary hearing to resolve disputed facts in EAJA claims is scarce. One court, however, has addressed the issue in the context of the codified "bad faith" exception, 2412(d)(1)(A). In *McQuiston v. Marsh,* 707 F.2d 1082 (9th Cir.1983), an unsuccessful bidder on an army contract brought an action to have the contract award set

aside. The contractor's petition for attorneys' fees under the bad faith provision of the EAJA was denied and claimant appealed. The circuit court found that "[t]he parties raise a factual dispute as to the bad faith, if any, of the government both before and during the course of this litigation." *Id.* at 1086. Accordingly, the court remanded the proceedings to the district court to make findings on whether the government's conduct amounted to bad faith.

Courts have also remanded cases for evidentiary hearings and specific findings of bad faith in non-codified "bad faith" attorneys' fee cases. *See, e.g., Robinson v. Ritchie,* 646 F.2d 147, 149 (4th Cir.1981). This suggests that there is a little tolerance for district court rulings on requests for fees under the "bad faith" exception which fail to make specific findings of bad faith.

In the present case, however, Judge Kelly confronted the question of the government's bad faith and determined that "there was no evidence of bad faith exercised at the hands of the Department of Agriculture or their attorneys in the preparation or the filing of this case." An evidentiary hearing for specific findings of bad faith is therefore unnecessary in this case.

Finally, we hold that the district court's refusal to accept proffered evidence on the issues of substantial justification and bad faith is not reversible error. Although the court could have allowed Jarboe-Lackey to proffer evidence on these issues, appellant was not prejudiced. The trial court gave the parties ample opportunity to brief and to argue the EAJA issue, including an opportunity to submit pertinent affidavits, and rendered its decision based upon careful consideration of all arguments before the court. We therefore affirm its ruling denying claimant's motion for an evidentiary hereing.

IV

The third issue raised on appeal is whether there is evidence in the record to support a finding of fact that Jarboe-Lackey steers were "illegally implanted" with DES after the effective date of the growth promotant ban. The crux of appellant's argument is that no inference can be drawn that all 273 head of cattle contained DES implants when only six[12] randomly selected ears were analyzed. Jarboe-Lackey therefore asks this Court to reverse the district court's finding that the DES implants were administered after the FDA ban.

"An appellate court must accept a trial court's findings of fact unless they are clearly erroneous." *Moreno v. Stahmann Farms, Inc.*, 693 F.2d 106, 108 (10th Cir.1982); *Castillo v. United States,* 552 F.2d 1385, 1388 (10th Cir.1977); *Ahern v. Veterans Administration,* 537 F.2d 1098, 1100 (10th Cir.1976). After reviewing the entire evidence, we are not "left with the definite and firm belief that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948). Rather, we find that the ruling of the trial court is supported by the evidence.

On April 17, 1980, Dr. Gerald Rousseau, a USDA supervisory medical officer, observed recently implanted DES pellets in the ears of 40-50 steers owned by Jarboe-Lackey Feedlots, Inc. Dr. Rousseau removed seven ears for laboratory examination. The tests confirmed that the ears all contained DES pellets that were implanted on or after November 1, 1979. Appellant claims that it implanted steers with Ral-Gro rather than with DES, on or

---

[12]Although seven ears were removed, it appears that the pellet from one ear was lost on the way to the laboratory.

after November 1, 1979. But it also concedes that there were "1500 to 1700 steers which apparently were not implanted with Ral-Gro." Finally, Jarboe-Lackey admits that it had no way of knowing whether any of the 273 steer were implanted with DES after the effective date of the ban.

There is no evidence in the record which directly contradicts the trial court's finding. Indeed, the observations of Dr. Rousseau and the affirmative DES test results support a conclusion that the 273 head had been illegally implanted. We hold that the district court's finding is supported by the record and that is not clearly erroneous.

V

Finally, Jarboe-Lackey contends that the court erred in denying its motion for recoupment and counterclaim for recoupment. Claimant seeks compensation for the diminished value of the res during the period of detention. Since jurisdiction of the condemnation action includes the power to return the goods to the claimant upon denial of the decree, Jarboe-Lackey reasons that it impliedly includes authority to compensate for depreciated value.

We do not agree with appellant's reasoning. Recoupment is not an appropriate means to recover money damages from the United States in this seizure action. This is because recoupment is merely "the right of the defendant to have the plaintiff's monetary claim reduced by reason of some claim the defendant has against the plaintiff arising out of the very [matter] giving rise to the plaintiff's claim" *First National Bank of Louisville v. Master Auto Service Corp.*, 693 F.2d 308, 310 n. 1 (4th Cir.1982); *see also* 6 C. Wright & Miller, Fed.Practice & Procedure, Civil, § 1401 (1971 & Supp.1983). Although the sovereign

waives immunity as to claims of the defendant which are asserted in recoupment, it does not waive immunity as to claims of a different form or nature than that sought by it. *Jicarilla Apache Tribe v. Andrus,* 687 F.2d 1324, 1344 (10th Cir.1982). In *United States v. Ameco Electronic Corp.,* 224 F.Supp. 783 (E.D.N.Y. 1963), the court explained that where the government is not seeking a judgment for a sum of money – there it was asserting title to certain chattels – "[t]he very nature of the action makes it impossible to reduce or discharge the claim by recoupment or setoff. A denominator common to the two claims is absent." *Id.* at 786.

In the case at bar, the government was seeking only seizure and condemnation remedies. Recoupment, therefore, may not serve as the basis of a claim for money damages arising out of this seizure action.

Appellant's counterclaim for recoupment was also properly dismissed. "Because the government cannot be sued without its consent, . . . [Jarboe-Lackey] must demonstrate that the government has waived its immunity to the kind of claim it asserts." *United States v. Lockheed L-188 Aircraft,* 656 F.2d 390, 393 (9th Cir.1979). The first count in the counterclaim purports to invoke the court's jurisdiction under the Federal Tort Claims Act, which provides in pertinent part

> [t]he district courts, . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . , for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the

> United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
> 28 U.S.C. § 1346(b) (1976).

The United States, however, has not waived its immunity to liability with respect to claims arising from the "detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer." 28 U.S.C. § 2680(c). *See United States v. Lockheed, supra* at 397; *United States v. 1500 Cases,* 249 F.2d 382, 384 (7th Cir.1957). This express reservation of sovereign immunity requires dismissal of appellant's first count.

Jarboe-Lackey also asserts that 21 U.S.C. § 673 and 28 U.S.C. § 2465 provide statutory bases for its counterclaim. We must reject this contention because neither provision waives the United States' sovereign immunity to the type of claim asserted by claimant. *United States v. Lockheed, supra* at 393.

Section 673 of the Meat Inspection Act, which authorizes condemnation actions by the government against adulterated meat and articles, does not grant claimant specific statutory authority to bring suit against the United States. Section 2465, on the other hand, allows recovery of costs from the government in seizure actions, but carefully reserves immunity when "it appears that there was reasonable cause for the seizure." Although the district court did not enter a certificate as provided in the statute, there is little doubt that there were reasonable grounds for the seizure of Jarboe-Lackey carcasses. *See United States v. 1500 Cases, supra* at 384.

Although appellant has not asserted a viable recoupment counterclaim here, it may not be entirely without recourse. It may still have a cause of action against the

government under the Tucker Act. *See 28 U.S.C.* § 1491 and 28 U.S.C. § 1346(a)(2). Such a claim, however, should be brought in the United States Claims Court since it appears to be over $10,000. 28 U.S.C. § 1491.

Affirmed.

APPENDIX B

JUDGMENT ON DECISION BY THE COURT **CIV 32 (7-63)**

UNITED STATES DISTRICT COURT FEB 17 1982
FOR THE
DISTRICT OF KANSAS

Civil Action File No. 80-1360

UNITED STATES OF AMERICA	)	
	)	
vs.		AMENDED
	)	JUDGMENT
2,116 BOXES OF BONED BEEF WEIGHING APPROXIMATELY 154,121 POUNDS, and 541 BOXES OF OFFAL WEIGHING APPROXIMATELY 17,732 POUNDS	)	

This action came on for (hearing) before the Court, Honorable Patrick F. Kelly, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that plaintiff's complaint in rem be dismissed; claimant's counter-cross-complaint and motion for recoupment being untimely and irrelevant are hereby dismissed. In addition, claimant's motion for attorneys fees and costs of litigation is denied.

Dated at Wichita, Kansas, this 16th day of February, 1982.

FILED
FEB 16 1982
ARTHUR G. JOHNSON, Clerk
By /s/ S. Morris, Deputy

ARTHUR G. JOHNSON
Clerk of Court
By /s/ S. Morris

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF KANSAS

UNITED STATES OF AMERICA	)	
Plaintiff,	)	
vs.		Civil No.
	)	80-1360
2,116 BOXES OF BONED BEEF WEIGHING	)	
APPROXIMATELY 154,121 LBS., and	)	
541 BOXES OF OFFAL WEIGHING APPROXI-	)	
MATELY 17,732 POUNDS		
Defendants.	)	

MEMORANDUM AND ORDER

Consistent with the findings and conclusions announced this date, claimant's motion for reconsideration and for an amendment of the judgment of February 8, 1982, is overruled.

It is further ordered that the stay of the return of claimant's beef previously entered shall remain in effect pending appeal of this matter to the Court of Appeals for the Tenth Circuit or expiration of the appeal time in 60 days.

IT IS SO ORDERED this 5 day of March, 1982.

/s/ Patrick F. Kelly
PATRICK F. KELLY, JUDGE

FILED
MAR 5 1982
ARTHUR G. JOHNSON, Clerk
By /s/ M. Miller, Deputy

APPENDIX C

516 F. Supp. 321

UNITED STATES of America, Plaintiff

v.

2,116 BOXES OF BONED BEEF WEIGHING APPROXIMATELY 154,121 POUNDS, and 541 Boxes of Offal Weighing Approximately 17,732 Pounds, Defendant

Civ. A. No. 80-1360

United States District Court,
D. Kansas.

May 7, 1981.

MEMORANDUM AND DECISION

KELLY, District Judge.

This is a statutory seizure action filed by the United States of America, plaintiff, pursuant to Section 673 of the Meat Inspection Act. This relates to the boned beef and offal of a lot of 273 animals, which were implanted with an illegal drug. The drug in question is diethylstilbestrol (DES), a drug allegedly known to cause cancer and other toxic effects, and which drug was implanted in the cattle (steers) after the last legal implant date as established by the Food and Drug Administration. The implants of DES were still present and were detected at the time of slaughter of the cattle and the carcasses and offal were officially held by the United States Department of Agriculture. Jarboe-Lackey Feedlots, Inc. is the owner of the beef in question and because this is an *in rem* action against the food, this party is not a defendant but only a

claimant, intervening in behalf of the seized beef. The government alleges that the meat and offal of these animals is adulterated pursuant to 21 U.S.C. § 601(m)(1), M2A and M3. In this, if the food is adulterated in any of these ways, the law requires that it be condemned and disposed of by destruction or sale, pursuant to order of this Court in conformance with the Act and the laws of the jurisdiction in which the beef was sold.

Initially the matter came to the Court's attention by way of the government's motion for summary judgment and claimant's motion for judgment on the pleadings. Each provided considerable affidavits and other authoritative material accompanied with briefs and arguments. Upon full review and reflection, it was apparent to the Court that considerable disparity of the material facts and law existed and the government's motion was overruled. The thrust of claimant's motion was based on the Secretary of Agriculture's alleged unlawful retention of the seized meat and offal in excess of a 20-day statutory period prior to the filing of the seizure action and in violation of 21 U.S.C. § 672. The timely relevancy of this procedure was not clear to the Court and as a consequence the matter was taken under advisement, pending further evidence and argument. In light of the findings of this Court, as hereinafter set forth, further consideration of defendant's motion appears redundant and is now overruled.

Having reviewed the Court's finding as it relates to the plaintiff's motion for summary judgment, the parties were advised that as a finder of fact, the Court, on the strength of affidavits and other exhibits at hand, probably had sufficient factual data to adduce significant findings of fact and reach an ultimate decision. The parties agreed to this format, subject to the privilege to amend, polish, or other-

wise "embellish" their respective data and positions. This proposal was acceptable, assuming then, that each would respond and comply within the week, and the matter would then be ready for final argument and submission. It developed that as each side pondered their respective position, and the Court surmises the strength or *weaknesses* of the other, each began to add and detract, significantly, and to the point that ultimately – neither would agree to the other's contentions or proffers, each finding fault with the other's case, and at which time the Court resolved the impasse by scheduling the matter for full evidentiary hearing. In retrospect, save the learning process garnered in the course of those proceedings, a full evidentiary hearing probably should have been anticipated and scheduled from the outset, but which, ironically, has changed nothing as it relates to the Court's ultimate decision. It has only served to enhance it! As it relates to trial preparation, an orderly discovery calendar was set, the Court available for status conferences and a pretrial conference, at which time certain admissions, stipulations and ultimate orders were entered. In the final analysis, as the case commenced to trial, both sides were fully prepared, each at liberty to exhaust *every facet* of this most provocative issue.

In the course of three weeks' time, the very nature of the issues in controversy, as developed and expounded by both parties, exposed the trial court to the intricacies of varied scientific and technical discipline. In part, it has engaged the expertise and learning of outstanding and dedicated authorities, both private and public, both sides. For the Court, a layman in the truest sense, it has been a learning process throughout. It has required an appreciation and perception in such fields as the sensitivity of chromatography; infra-red spectro-photometry; animal studies of varied character and its relationship to man;

biostatistics, i.e., risk assessment or extrapolation of data as it might affect the consuming public; biochemistry, including the course of estrogenic hormones and the protein receptor principle; epidemiology; toxicology, including molecular breakdown of chemicals involved; pharmacology; the functions of certain organs, i.e., livers, kidneys, and the significance thereof; and, of course, cancer, other effects and the implications of DES.

While these and others, as brought to the Court's attention, are complex subjects and probably to the experts only the "tip" was explored, thanks to their most candid and objective presentations, hopefully, the thrust of their respective presentations were perceived and retained.

The Court is frank to acknowledge, that while all of the foregoing appeared complicated and foreign to the Court's experience from the outset, a most serious problem in the perception of testimony and its relationship to the "real world," as so often addressed by claimant's counsel, was an appreciation of the metric system, i.e., conversion of grams, milligrams, nanograms, to something common to the Court's own experience. The record is replete with the Court's inquiry, i.e., request to convert into factors readily understood. In the scientific world the quantum of the remnants of the drug in question is measured against the weight of the beef in question in parts per billion (ppb). In this, one nanogram per gram equals one ppb. A grasp of the significance of such findings, in the interest of the Court's realistic perspective, has been exasperating. For example, understanding a resume of the following evidence:

> The government, in part, contends that a finding of 6.25 ppb has been established in certain mice studies to affect a carincogenic response. As this converts to the human's average consumption of

> beef, it represents 0.002 ppb or 0.002 mcg/kg (Claimant's ZZ). In the real world, this converts to a consumption of approximately 18,940 pounds of beef per day.

Such an example is only intended to express the complicated nature of this case, but, it is to say such an ultimate finding is also an example of the very kind of factual findings and conclusions as a consequence with which the Court has been required to deal. Simply stated, to adopt claimant's view – a quest of a few grains in a massive field of sand. The Court concurs, the significance of this quantum being the ultimate issue.

In addition, the mass of exhibits, including considerable authoritative references, articles, not the least of which include reams of the Federal Register, have been read and digested. While only referenced in a cursory way, considerable portions of the "Congressional Record," tracing the history and intent of Congress as it relates to the act in question, has been reviewed. While not necessarily helpful, it has satisfied the Court's attempt to more fully appreciate the propriety of that which is at hand. To capsule:

> The Federal Meat Inspection Act was enacted to provide additional legislation which in the view of Congress was "urgently needed for truly adequate protection of consumers, legitimate operators in the affected industries and others associated therewith . . . . The object of the proposed bill is to eliminate numerous opportunites now present to defraud consumers and endanger public health." Letter from the Department of Agriculture requesting the legislation, U.S.Code and Administrative News, p. 2209 (1967). Likewise 21 U.S.C. § 602, Congressional Statements of Findings, states, "it is essential in the public in-

> terest that the health and welfare of consumers be protected." Seizure and condemnation is a means to protect the public from adulterated food. The Secretary is not required to bring a condemnation action when adulteration is only suspected; 21 U.S.C. § 676(b) states, "Nothing in this chapter shall be construed as requiring a Secretary to report for prosecution or for the institution of libel or injunction proceedings, minor violations of this chapter whenever he believes that the public interest will be adequately served by a suitable written notice of warning."

Indeed, the rationale for the reduced governmental burden of proof in this seizure action is the purpose of suppression of a public wrong. See *C.C. Co. v. United States,* 147 F.2d 820, 824 (5th Cir. 1945).

Each witness, the substance of his testimony, the thrust of cross-examination, both sides, the witness's demeanor, his qualifications, experience, his ultimate reliability, believability, has been weighed and perceived. In the recent past, the entire transcript of approximately 4,000 pages has been reviewed by the Court. This review has been most helpful, not only for the purpose of an accurate reference to the evidence recited in this opinion, but also to confirm the accuracy of trial notes, including reflection, i.e., initial impressions through the course of hearing. While this review is obviously required in the interest of accuracy, it has also changed nothing insofar as trial findings are concerned.

Indeed, the Court's ultimate decision comes only after a full contemplation and hopefully perception and appreciation of each of the foregoing and other disciplines, objectively applied to the evidence at hand.

Upon completion of full hearing, the government renewed its motion for judgment, which was overruled. Now counsel have most vigorously argued their respective causes. Some additional briefs, suggested findings of fact and conclusions of law are submitted. In this, the quality of trial counsel, their work products, exhibited throughout the course of these proceedings, was commendable and deserving of comment. In the absence of their own intense preparation, learned articulation and presentation of evidence and witnesses, and their patience, this case, in the hands of less able counsel, might still be ongoing. These traits were noted and appreciated by this trial judge.

In addition, and in furtherance of clarity as it relates to the Court's ultimate decision, some essential rudiments are recited, each having been perceived as fact and none ignored:

> DES is one of a class of chemicals known as stilbenes. Stilbenes are not produced metabolically by animals; they do, however, produce effects similar to those produced by endogenous estrogens. It is considered a synthetic estrogen and was first synthesized in 1938 and approved for use in cattle feed in November, 1954. Its use is as a growth promotant, having considerable economic benefit in the livestock business. A new drug application for DES implants in cattle was issued under the Food, Drug and Cosmetic Act in December, 1955. In this regard, approximately 15 milligrams of DES are implanted subcutaneously into the ear of the steer as a pellet, which dissolves over time, and ostensibly provides DES continuously in the animal's circulation. DES is a carcinogen in animals. In 1958, the Act was amended by addition of the Dulaney Anti-Cancer Clause, codified at 21 U.S.C. 360b. The

amendment required the FDA to refuse to approve use of a drug if the Secretary found that "such drug induces cancer when ingested by man or animal." DES is such a drug. In 1962, Congress enacted an exception to the Dulaney Anti-Cancer Clause, known as the DES Exception. This exception is codified at 28 U.S.C. 360b (d)(1)(h). In June, 1972, the FDA made an attempt to withdraw approval for the use of DES, the agency action being reversed because of procedural defects. *Hess and Clark Div. of Rhodia, Inc. v. Food & Drug Adm.*, 495 F.2d 975 (D.C.Cir.1974). This decision details the administrative history with regard to DES until 1974. It was not until 1976 that the FDA again took steps to revoke the approval of the use of DES in animals. Notice of hearing was issued in November, 1976. On July 6, 1979, the FDA issued a final rule revoking the animal drug regulations which had permitted the use of DES in cattle as both an animal feed and as a subcutaneous implant. 44 FR 393837. At this time, the FDA issued notice that it was revoking the NADA's applicable to DES for both feed and implants. 44 FR 39618-39619. These notices were to become effective on July 13, 1979, as to the manufacture and shipment. Animal use of DES drugs was to be discontinued effective July 20, 1979. Following protests from DES users and what would appear to be an obvious in-house political in-play, the effective date of the DES ban was postponed until August 3, 1979, and again postponed until November 1, 1979. 44 FR 42679, 45618, 45764. It was subsequent to this date that the claimant, and probably inadvertently, caused the cattle in question to have been implanted (Government 51).

As relates to the ban, the Court further notes that during the course of this proceeding the manufacturer's second appeal was decided in *Rhone-Poulenc, Inc., Hess & Clark Div. v. Food & Drug Adm.*, 636 F.2d 750 (D.C. Cir.1980). The thrust of this decision, of course, finalizes for all time the FDA ban.

Of interest to the Court is the fact that the appellate court addressed itself to the sufficiency of fact adduced in the administrative hearing engaging different ground rules for admissibility of evidence and a different burden of proof. Some focus is given to this circumstance now, as the gravity of that decision has been repeatedly urged upon the Court, suggesting that the ultimate findings of the FDA commissioner and now of the appellate court be adopted here as final authority. In light of these contentions, and fully aware of the implications suggested by the FDA findings, it is appropriate to assure the parties that the Court has *not*, and an understanding of this best premises and contrasts this opinion.

The thrust of the commissioner's findings are geared to certain conclusions that the drug is "not shown to be safe." For reasons as hereinafter reviewed, this is not the test required by this Court. To explain, in the commissioner's review of testimony, laboratory findings, and the scientific literature in an attempt to discover a "no effect level" for DES, i.e., a dosage level at which DES would not cause cancer or other harmful effects in human beings, he concluded that no such level had been demonstrated and that DES is, therefore, "not shown to be safe since there is no proof that small amounts of it are not harmful." 44 FR 54, 873-81. The appellate court concludes that: "By proceeding in this matter the commissioner has met his 'initial burden of coming forward with some evidence of the rela-

tionship between the residue and safety . . . .' *Hess & Clark,* supra [161 U.S.App.D.C.], at 413, 495 F.2d 993. He is relying not only on the fact that larger amounts of DES are harmful, but upon laboratory studies which conclude that it is impossible to determine a safe level of DES in human beings. This evidence is sufficient to shift the burden of showing the safety of DES to the manufacturers, and as urged here to suffice the plaintiff's case. Id."

It is this Court's view that, as opposed to whatever procedures and burdens are imposed in a governmental administrative hearing, here, in a court of law, where, indeed the ultimate "laboratory," in the quest for truth, time-honored requisites are followed. They include the admissibility of competent evidence within the meaning of the rules of evidence. Specifically, as it relates to the perception of factual scientific issues, conclusions are geared to "meaningful projections from reliable data." *Monsanto Co. v. Kennedy,* 613 F.2d 947, 949, 952 (D.C. Cir.1979), Food, Drug & Cosmetic Law Rep. 38.010. Consistent with this view, this Court has not given serious review to evidence emanating from rank speculation. Of paramount import, the concept of due process, in the Court's view, imposes the burden of persuasion on the proponent, here the government, and this burden does *not* shift. Conversely, the proponent's cause is not met on the establishment of certain "negative" findings from which "positive" conclusions are to be drawn. The government's case must be reasonably positive and convincing to meet its burden, however modest.

It is this Court's appraisal of the matter before the commissioner, which incidentally involved the presentation of many of the witnesses before this Court, that had he listened personally and as intently as this judge did, and

the burden was similar, his decision probably would have been a different one. His, being administrative, involved the presentation of witnesses most of whom submitted their testimony in written form. Some, quite material in this Court's view, were not invited to participate. Others, considered most material in this case, were not cross-examined. In other words, while the entire record before the FDA is most informative and enlightening to this Court, it does not serve to tilt this factfinder.

Lastly, and again in the Court's grasp for perspective, particularly as relates to DES and its implications with cancer and other effects, some solace was given to the oft-repeated idiom of the Grecian, Paraselsus, who first clarified "the dose determines the poison." This truth suggests in part that all chemicals are poisonous and it is the quantum which makes the difference. It follows that DES is a chemical and as a consequence, as any other chemical, is poisonous. Its ultimate toxic effect necessarily depends upon the quantum of its dosage and use. In this, this thesis has been accepted from the outset as the evidence has been weighed. In other words, while the government would suggest that the mere presence of DES in this or any beef is of significance, it has been received awaiting the government's persuasion that the quantum involved in the case at hand would hurt anyone.

> As a realist, the Court now appreciates that the consuming public, i.e., approximately 200 million people, have daily and continuously consumed beef of DES implanted cattle for a period of approximately 25 years without a single report of a carcinogenic effect. Why this experience cannot serve as an inadvertent but most persuasive test escapes the Court. Again, as the evidence is reviewed, its significance will come to

bear, the effect of the ban precludes henceforth the legal use of DES. This edict is a fact of life and not in issue here. We deal here, therefore, with the matter of "adulteration, if any, of the beef in question, which represents approximately 150,000 pounds of meat," ostensibly distributed in normal commercial channels. All of the experts seemingly agree that as it relates to whatever conclusions are drawn as to the adulteration of beef, it is to assume that this consuming public will consume approximately two ounces per day continuously for the remaining portion of their respective lives. The relationship of such a test to the beef in question again escapes the Court.

The Meat Inspection Act and the Government's Burden

As a prelude to the resume of factual findings and ultimate conclusions, some discussion of the Act in question and this Court's understanding of the requisite burden of proof is necessary. In this, the requisite portions of the Act in question are as follows:

a. Any carcass, part of a carcass, meat or meat food product of cattle, sheep, swine, goats, horses, mules or other equines, or any dead, dying, disabled, or diseased cattle, sheep, swine, goat, or equine, that is being transported in commerce . . . and that . . . is capable of use as human food and is adulterated or misbranded . . . shall be liable to be proceeded against and seized and condemned, at any time, on a libel of information in any United States district court. . . (21 U.S.C. § 673).

* * * * * * *

> The term "adulterated" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:
>
> (1) if it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance, such article shall not be considered adulterated under this clause if the quantity of such substance in or on such article does not ordinarily render it injurious to health;
>
> (2)(A) if it bears or contains (by reason of administration of any substance to the live animal or otherwise) any added poisonous or added deleterious substance . . . which may, in the judgment of the Secretary, make such article unfit for human food;
>
> * * * * *
>
> (3) if it contains in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food. [21 U.S.C. § 601(m)(1), (m)(2)(A), & (m)(3).]

Again, in the interest of clarity, each definition will be treated separately; however, it is obvious and probably conceded by both parties, that the focus of this case was addressed to (m)(1), and only after the tests applicable to this section are weighed will discussion follow with regard to the others.

In this, as it relates to Section 601(m)(1), the standard for defining "may be injurious to health" as used in the Food and Drug Act is established in *United States v. Lexington Mill & E. Co.*, 232 U.S. 399, 34 S.Ct. 337 58 L.Ed 658 (1914). The *Lexington Mill* libel action charged that

flour had been treated by an Alsop process by which nitrogen peroxide gas was mixed with air and brought in contact with flour, causing its adulteration. Adulteration was claimed in that the flour contained a poisonous or other added deleterious ingredient which might render the flour injurious to health. A jury returned a verdict in favor of the government, the 8th Circuit reversed, and the Supreme Court affirmed the reversal.

The evidence concerning the presence of poisonous substance, nitrogen, and the possibility of its being injurious to health, was conflicting. The government attempted to show the poison present in a proportion of 1.8 ppm and that it would be injurious to those who used the flour in bread or other forms. On the other hand, respondent showed the process did not add any poisonous or deleterious ingredient to the flour which could in any manner render it injurious to the health of a consumer. The court instructed the jury that it need only find that a substance had been added to the flour. "It is the character – not the quantity, of the added substance, if any, which is to determine this case." 232 U.S. at 408, 34 S.Ct. at 339.

The Supreme Court found that the instruction constituted prejudicial error because it permitted the statute to be read without the final and qualifying words; the instruction failed to state the legal standard that the contaminating material must render the article injurious to health before the statute was violated. The Court reasoned that if Congress had intended to make presence of nitrogen a violation per se, it would not have legislated the additional health-affecting requirement. The purpose of Congress was to prevent injury to the public health. As against adulteration, the statute is intended to protect from possible injury through addition of articles which are

poisonous or deleterious and which may render such articles injurious to health.

As to the burden placed upon the government, the Court rejected a standard requiring proof that the allegedly adulterated food contains substances which *will* affect the public health. In order to prevail, the Act imposes on the government the

> burden of establishing, . . . that the added poisonous or deleterious substances must be such as may render such article injurious to health. *The word 'may' is here used in its ordinary and ususal signification, there being nothing to show the intention of Congress to affix to it any other meaning.* (232 U.S. at 411, 34 S.Ct. at 340) (Emphasis added).

The Court quoted from congressional records which indicate that poison depends both on the *quantity and the combination* of ingredients. Per se adulteration was not intended. "May be injurious to health" is to be interpreted in its natural and ordinary sense. Where there is no possibility of harm under a *reasonable* consideration of the facts, the food is not within the ban of the statute. Numerous decisions subsequent to *Lexington Mill* have affirmed that the phrase "may be injurious to health" is one of a reasonable consideration of the facts.

The definition of adulteration in the Federal Meat Inspection Act, 21 U.S.C. § 601(m)(1), is identical to that included in the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 342(a)(1). Both sections state adulteration includes food which "bears or contains any poisonous or deleterious substance which may render it injurious to health." *There have been no decisions under the Federal Meat Inspection Act interpreting this definition of adul-*

teration. Because of the identical wording and the similar legislative purpose of both Acts, case law interpreting adulteration under this definition in the Food, Drug and Cosmetic Act should be determinative of the interpretation applicable under the Meat Inspection Act.

In *Millet, Pit & Seed Co., Inc. v. U.S.*, 436 F.Supp. 84 (E.D.Tenn. 1977), two suits, a civil rights action and a condemnation case, were consolidated. The government seized cases of apricot kernels alleging, inter alia, that they were subject to condemnation as an adulterated food within the meaning of 21 U.S.C. § 342(a)(1). However, the alleged deleterious substance was not an added substance but was one which occurred naturally. Therefore, the applicable standard was not "may be injurious to health," it was the less stringent statutory standard that the food could not be considered adulterated if the quantity of such substance in the food does not ordinarily render it injurious to health. 21 U.S.C. § 342(a)(1). The Court readily found that the poisonous substance did not render the apricot kernels ordinarily injurious to health. In so doing, it noted that *Lexington Mill*, in quoting from the legislative history of the 1906 Act, recognized that poisonousness rests upon both the *quantity and the combination* of the substance. Many substances, if consumed in excess, will produce some adverse effect. Despite government evidence of the possibility of harm from ingestion of *excessive quantities* of apricot kernels, the Court concluded that under the ordinary uses and ordinary conditions standards for naturally occurring substances, the government failed to carry its enhanced burden of proof.

A substance which occurs naturally and is also added to the environment by man, i.e., mercury, is considered in *United States v. Anderson Seafoods, Inc.*, 447 F.Supp.

1151 (N.D.Fla.1978), aff'd 622 F.2d 157 (5th Cir. 1980). The United States claimed that swordfish were adulterated within the meaning of 21 U.S.C. §342(a)(1). Before deciding which standard of health injuriousness would be applicable to the seized swordfish, the Court first addressed the question whether the mercury occurred naturally or was an added substance. The trial court determined that because man had significantly affected the total level of mercury in swordfish, the allegedly adulterated fish fell within the first aspect of the definition for added deleterious substances. The Fifth Circuit, however, did not address the trial court's application of the "may be injurious to health standard." The district court interpreted the word "may" to connote a "reasonable possibility."

> It does not mean that a food may be prohibited absent absolute certainty that no one under the most extreme circumstance could be harmed. Nothing in the Act or legislative history suggests that Congress intended to proscribe a food simply because it was physically possible for someone to consume enough of it to harm oneself. The Supreme Court has taken notice that a person could be harmed by ingesting a certain level of table salt, or even water. *United States v. Anderson Seafoods, Inc.*, 447 F.Supp. at 1155.

Reliance is placed on *Lexington Mill, 232 U.S. at 399, 34 S.Ct. at 337; Berger v. United States,* 200 F.2d 818 (8th Cir. 1952); and *Wood v. United States,* 286 F. 84 (7th Cir. 1923). The Court concluded that swordfish containing 1.0 ppm or less of mercury "pose no reasonable possibility of injury to anyone's health, [therefore] they cannot be deemed adulterous within the meaning of Section 342(a)(1)," *United States v. Anderson Seafoods, Inc.*, 447 F.Supp. at 1159.

Three distinct standards for determining injuriousness to health under 21 U.S.C. § 342(a)(1) have been discussed by the courts: (1) injuriousness per se from the presence of a poison in however small an amount, rejected by *Lexington Mill;* (2) reasonable possibility of harm for added deleterious or poisonous substances, defined by *Lexington Mill*; and (3) injurious under ordinary uses and under ordinary conditions for naturally occurring substances.

The parties seemingly concur with the foregoing resume as the basic guidelines, the effect of which shapes the decision of this case. Not surprising, there is little concurrence as to how it should be applied. Indeed, the Court's enigma has dealt with the weighing of that which is possible. Such a test, unlike any other known in the Court's experience, offends his sense of due process. Surely, in a traditional way, only the test of that which is probable, i.e., likely, can the truth be found. Possibilities, embodying rank speculation, in any other setting are not admissible, let alone left as the basis of decision. Actually, the court has prayerfully given more time and attention in his deliberation of the interpretation of this test than the evidence itself. Accordingly, No. (2), i.e., that which is reasonably possible, is adopted as the standard for which the government's burden is tested. In this, the Court has received this case, weighed it and decided it, hopefully with a sense of common sense, the effect of which an objective and fair decision is reached. Simply stated, emphasis to that which is reasonable is the catalyst which breaks the impasse and determines this case. With this understood, and contrary to repeated urgings and inuendoes urged by the government, it is not to say in a close case, i.e., the evidence relatively equal, or even remotely possible, in the interest of consumer safety, the government wins. It is to say that in a court of law, whatever the test, in the event of the pro-

ponent's failure to persuade – failure to tip the scales – failure to meet its burden – it loses! In the final analysis, this is the only reasonable test known to this or any court – and applies here. Conversely, it is also to say that the mere presence of DES in this or any beef does not automatically render it adulterated. If Congress so intended, it could have said so! In lieu of such an adamant proclamation, that body seemingly has contented itself to leave such a decision to trial court, and in the exercise of due process, as the Court perceives it, extended to both parties, now each have had their day.

Sequence of Evidence and the Court's Commentary, with Findings

A review of the evidence in this case logically commences with the involvement of the Jarboe-Lackey Feedlot as represented here through Mr. Jud Lackey, its president. In November, 1978, his company had received a quantity of DES implants for use in his rather large cattle operation. By November, 1979, and notwithstanding his awareness of the ban, principally in light of the fact that he had requested an extension for the purpose of using up the remaining portions of DES on hand, it is obvious that his hands did implant cattle with the compound. It would appear that on April 17, 1980, of the total number of steers sent to MBPXL for slaughter, at least 197 head of 273 head of cattle were so implanted. Dr. Gerald Rousseau, DVM, the supervisory medical officer of MBPXL, an employee of the U.S. Department of Agriculture, on April, 17, 1980, observed the DES implanted pellets in the ears of certain slaughtered cattle and confirmed them to be those of the Jarboe-Lackey Company. He was advised to retain the cattle and to take samples, i.e., seven ears. In the course of events, he segregated the carcasses and

followed through the process ultimately resulting in the 2156 boxes of boned beef, including 193 boxes of liver.

> While probably not relevant to this sequence of events, puzzling circumstances are noted as they relate to the government's policy as of that point in time: As of November 1, 1979, the DES ban was in effect; however, if cattle so implanted prior to October 31 were presented for slaughter on April 17, 1980, such a condition was considered legal (I and 69). In addition, as of that point in time, the government authorized an explant program, the effect of which required the cattle operator to remove the implanted ears 120 days in advance of slaughter, the program recognized as the "authorized distribution of adulterated beef" (P). Seemingly 0.6 ppt in muscle was considered safe as opposed to whatever quantum it then contended was within the cavities of the Lackey beef.

Typically speaking, the government's monitor program is that certain samples of liver are from time to time forwarded to certain laboratories under government contract. In light of the sensitivity of the equipment used to register a presence of DES, if any, findings under .5 parts per billion in liver are *not* considered significant. In light of this, it is obvious that even today, and henceforth, unless the government has specifically focused on commercial beef to the extent that they have "leveled" on Mr. Lackey's beef, considerable quantities of DES implanted beef pass into commerce – all with the government's acquiescence.

Much of the foregoing is emphasized and repeated throughout the course of this case, perhaps for other reasons, but, it is to remark now that, on hearing this, the Court's reaction to the fervor generated by most persuasive goverment counsel, as relates to the adulterated

nature of the beef in question, was dampered from the outset. These interesting anomalies remained on the conscience of the Court throughout the course of this matter.

Witness Myers, a chemist of the U.S. Food and Drug Administration, received six of the ear samples and submitted them to gas chromatography to confirm the presence of DES, and which was accomplished, the findings running from remnants of approximately 4.5 mg to 6.6 mg, 15 mg maximum having been initally implanted. In this regard, while considerable contest follows as to whether any DES is lodged in the beef, it was apparent from the outset that in light of Myers' finding, the presence of some residue seemed obvious, but probably legally insignificant. It is of interest to note here, however, that only upon commencement of this case and hearing witness Myers, does it become apparent to the Court, that at the time of the filing of the matter, only the claimant had actually tested the edible portion of the beef for the presence of DES in same. While the Court was unable to perceive all of the significant evidence at the time of the motion for summary judgment, it is now apparent to the Court that the same should have been promptly overruled.

> Ironically, it developed that the results of the claimant's tests were not admitted as being unreliable (Scofield). In this, inasmuch as the claimant had offered the Scofield findings in the course of its motion to dismiss and for the purpose of suggesting its minute quantity, the Court was at liberty to note the same, notwithstanding the formal inadmissibility.

In the course of events, and shortly prior to the commencement of trial, the government did cause certain specimens of the livers and kidneys to be tested. The ultimate results of these tests engaged a most extensive focus of the parties' and the Court's attention.

Commencing October 9, 1980, certain samples of liver and kidney from the Lackey beef were forwarded to the Chemistry Division of the U.S. Department of Agriculture for analysis by Mr. Hsu and Dr. M. Hoffman, chemist. Simply stated, the test results by gas chromatography and mass spectrometry purported to reflect the detection of no DES in any of the liver samples, however, eight of fifteen kidney samples reflected presumptive positives from .02 to .15 ppb. Two kidney samples were analyzed below .01 ppb and DES was not detected in the remaining five kidney samples. As a layman perceives it, the gas chromatography procedure is intended to determine an approximate quantum of the compound and the mass spectrometry procedure confirms its presence (14). These quantums serve to base the remaining data of the government's case and its gravamen became of considerable significance. In the course of witness Hsu's testimony, the parties respectively expressed considerable interest not only in the manner the gas chromatography procedure was conducted but the significance of the graphs from which the conclusions were reached. Notwithstanding considerable cross-examination as to the propriety of the ultimate findings, no objections from the claimant were suggested as to the admissibility and these instruments were understandably admitted.

> A review of the record reflects the Court's initial confidence in the reliability of witness Hsu and Hoffman's testimony. Indeed, some rather firm remarks to claimant's counsel, in his intense effort to test the propriety of these findings, are noted. In the Court's defense, and hopefully to any layman at this point in time, there was then no real basis for question of the obviously qualified witnesses. Only as the case developed did it

> appear that each was less than candid. As it relates to Exhibits 57, 58 and 59, it is not to say that the trial court did not retain some quandary as to the witnesses' interpretations of these graphs. To a layman, they surely fail to objectively demonstrate with any precision the substance of what the witness purports to show. It is simply to say that at the time of their respective testimony, the Court was without a basis to appreciate its significance. By example, the reliance upon the technician's observations of certain "peaks" ostensibly are found in these graphs, and which are intended to reveal the precise instance the presence of DES and its quantum is reflected. In most instances, as closely as the Court attempted to follow this evidence, no peaks were noted. Hopefully, such an observation does not offend the scientific world, but it is submitted here to express in part the Court's quandary in this most technical field.

To further explain the Court's present reservations as to the reliability of witness Hsu's interpretations, witness Scofield, also an organic chemist and residue supervisor at the Analytical Bio Chemistry Laboratory, and who had similarly tested for the claimant and incidentally one who routinely tests for the government, out of hand disclaims the reliability of those most important exhibits. In addition, Dr. Robert Sieck, an eminently qualified analytical chemist, and who it appears is the co-author and assisted in the development of the method used by witness Hsu, having reviewed the exhibits at hand, most persuasively disclaimed their reliability. In light of this circumstance and in rebuttal of the claimant's case, it was clarified that witness Hsu has, for the purpose of these tests, relied upon a certain hepta-fluorobutyryl (HFBT) derivative, and without attempting to relate the technical distinction, sug-

gests that the effect is that it enhances the sensitivity of the Hsu test approximately nine times over. This interesting entree is introduced by Dr. Hoffman in his rebuttal testimony, corroborated by Dr. Jack Watson, a rebuttal witness. At this juncture, it may be said that the thrust of the observations of these witnesses, i.e., Hoffman and Watson, need not be in doubt. It is to suggest that the significance of this entree was not brought to bear in the case in chief. In this regard, claimant's counsel fairly asked the witnesses if the GLC procedures had been modified (Hoffman, ¶ 121), (Hsu, ¶ 47), and this was denied. Government counsel repeatedly assured the Court that this procedure was not different than that routinely administered by the government in its tests for the presence of DES in beef. Claimant's counsel did not pursue this principally after admonitions from the Court. It now develops that neither witness was experienced with this derivative or its use here, Hsu revealing no experience, and Hoffman none prior to June of 1980, the samples in question taken for trial being the principal substance of his. Indeed, given another day, it is to say that claimant's counsel was denied fair cross-examination of either of these witnesses, and the present thrust of the observations and findings of witnesses Hoffman and Hsu is in doubt. For the purpose of this opinion, giving rise to full and fair cross-examination, at which time the foregoing revelations should have been brought forward through either witness Hsu or Hoffman, (Ex. 57, 58, 59), and the ultimate findings probably would not have been admitted in the absence of a fair foundation, save for "what it's worth."

At this point in time, the exhibits are before the Court and as to their propriety, it is to say that the Court places more credence for the presence of DES in beef in the fact that the animals were implanted than in witness Hsu's

findings, and to this extent it is acknowledged that the presence of DES is noted. It is not to say that such findings are of any legal significance. In this connection, for the purpose of the ultimate decision, the thrust of which addresses itself to the significance of the quantum, if any, is that, at most .02 ppb are noted in some of the kidneys, the maximum remotely suggested by the evidence. With the Court's reservations as noted, the government's remaining case is as follows.

As indicated, Dr. M. Hoffman was called principally to focus his expertise as it relates to the mass spectrometry findings. These differ from the former, the intended purpose being to establish the presence, not necessarily the quantum, of DES. A rebuttal witness, Dr. Watson, did volunteer that he could ascertain the quantum of DES from these graphs. The Court perceives the latter to be akin to those of fingerprints, which is hardly an available tool to ascertain the weight of a given person, certainly if measured in grams. The suggestion of Dr. Watson is discarded out of hand. Considerable focus was given to the thrust of witness Hoffman's findings and his readings of the graphs from his tests. Again, his findings were intensely focused and controverted by witness Sieck, the propriety rejected by the latter. This witness happened to have assisted in the development of the Donoho Method ostensibly relied upon by the government. His presence and testimony struck the Court as entirely reliable. Inasmuch as the Court has concluded that DES is probably present in the kidneys to the extent noted, corroboration of its presence was not necessarily required. By way of comment as to these exhibits, however, it is certainly to say that interpretation, by reason of its complexity, remains for the experts. Indeed, if the GLC findings presented problems of perception, these graphic readings

are more difficult. The trial court listened intently to all sides and studied the exhibits as closely as practicable. In light of the controversy that obviously exists between the eminent witnesses called in this case, they are disregarded as being of any scientific assistance to the Court. Simply stated, a review of these exhibits suggests that the experts can read into them about what they want to read, the Court perceiving nothing and is totally helpless, if, they were intended to be of benefit for either side.

The government then moved to confirm the presence of DES in the muscle or meat portion of the beef. This witness was Dr. Peter Aschbacher, a research physiologist, U.S. Department of Agriculture, who is conversant with radioisotope techniques and techniques of infrared spectroscopy and the chemical interpretation of infrared spectra. His research has developed a process for detection and quantitation of remnants of DES in tissue and excreta. His experience here is with regard to the 14/C DES experiments. The objectives of these studies were to place 14/C label DES implants into the ears of steers and then determine the excretion patterns of 14/C, the distribution of the 14/C within the body, and the extent that the 14/C in various tissues and excreta was associated with the DES molecule. On the strength of a review of the evidence at hand, he opined that residues of DES were probably in the edible portions of the beef in question. Frankly, as the witness came forward, the Court had assumed that this gentleman probably was one of the government's most significant witnesses. Indeed, the thrust of the government's case at the time of the motion for summary judgment would suggest this. The cross-examination of this witness, however, and particularly his remarks as shown in Exhibit M (Aschbacher, p. 81), served to negate this significance, the presence of DES in the meat portion, if

any, or of any significance by his standard, remaining in doubt. Certainly, if, at best, .02 ppb are found in the kidney, his thesis will not stand.

While the sequence of witnesses were not presented as capsuled, the government next focused attention on those witnesses who would purportedly relate the significance of the quantum of DES in the beef in question as it may affect the public's safety.

Inasmuch as each scientific witness in part relates his testimony to a certain study conducted by Dr. George H. Gass in June, 1964, i.e., Carcinogenic Dose-Response Curve to Oral Diethyistilbestrol, and his apparent findings are of significance in this case, some focus is given now as to these findings.

> This was an animal test wherein C3H female, C3H male, and strain A castrate male mice were divided into test groups that were given feed containing DES at the following levels: 0 ppb, 6.25 ppb, 12.5 ppb, 25 ppb, 50 ppb, 100 ppb, 500 ppb and 1,000 ppb. The test group ranged from 50 to 78 mice. The three control groups ranged from 115 to 136 mice. The government suggests a statistical significant incidence of mammary carcinoma was observed in the group of C3H female mice receiving the lowest dosage (6.25 ppb). The C3H female mice receiving 12.5 ppb and 25 ppb did not show a statistically significant increase in tumors over controls (both of these treated groups showed tumor in 43.3% of the mice as opposed to 33% in the controls .25 ppb group). There is no queston that the C3H female mice fed 50, 500 and 1,000 ppb DES developed mammary gland cancer and the evidence of cancer in the treated groups increased with the increasing

> levels of exposure. The test groups of C3H male and castrated male mice were less sensitive. Some tumors developed in animals fed 12.5 ppb but statistical significance was not clearly apparent below 6.25 ppb of exposure. The obvious points of contention are that the results of this study do not show that low levels of DES cause cancer and do show that low levels of DES do not cause cancer, i.e., that there is a "no effect" level.

This portion of the case commences with the government witnesses presupposing that the Gass report conclusively establishes the absence of any "no effect" level below 6.25 ppb, and as the Court perceives it, assumes therefore that consumption of DES-implanted beef of *any quantum* renders it adulterated. As the Court perceives it, an ultimate decision as to the propriety of these studies is critical.

Dr. Kenny Crump is a biostatistician and consultant for the government. His forte is that of risk assessment, i.e., the estimate of that which is possible, engaging what is considered the technique of extrapolation. This is an obvious and apparently acceptable aid in the decision making bodies of the Food and Drug Administration. While its reliability under the normal test of evidence, and which would exclude speculation, the witness, without interruption *or* objection, testified in depth as to his procedures and findings. The thrust of his testimony, accepting certain statistical data from the Gass study, is correlated to humans, 6.25 representing .002 parts per billion in the meat. He further references other articles (G-11) relating the average food intake of Americans at about 24 pounds a week, representing about 2.3 pounds of which is beef. If it is to assume that the average DES residue in beef muscle might be .2 ppb, the average dose of DES to Americans from DES residues in beef muscle is approximately .02

ppb. As previously indicated and as the evidence further develops, such a conclusion cannot conform to the evidence at hand. His thesis further assumes that the population of this country at risk is 200,000,000 people, and given a lifetime exposure to DES in meats at .02 ppb, would result in approximately 15,000 extra cancers as derived from the most sensitive mice strain as evidenced by the Gass study.

Dr. Larry S. Andrews is of the Division of Toxicology, Bureau of Foods, and has been called upon to evaluate practical conclusions as to the safety of the chemical in question. He appreciates the Gass findings and others. It would appear the substance of his testimony is that while amounts of DES in the tissue from animals in question are small and likely to be much less in beef muscle, these amounts have never been shown to be safe in food for human consumption. Because DES does cause cancer and birth defects in people and mutations in experimental animals, he does not believe that these amounts of DES are safe for people to eat. As a consequence, he has concluded that consumption of the beef in question may be injurious to health.

Dr. Robert J. Condon is a mathematical statistician with the Bureau of Veterinary Medicine of the Food and Drug Administration. He is presently on detail to the Office of the Commissioner, Associate Commissioner for Health Affairs, Scientific Liaison and Intelligence Staff. His duties at the FDA primarily involve the evaluation of biological test data on the effects of toxic substances and estimating the degree of risk associated with the consumption by humans of toxic substances. Indeed, since 1971 he has been involved in the evaluation of the toxicity and the degree of risk associated with consumption of residues of DES-implanted beef. The witness proceeded to summarize

the thrust of the government's case. He is a fully well-intentioned and partisan witness. It should be noted that he was called as rebuttal, principally to address himself to Gass's testimony (as hereinafter noted), disagreeing entirely with the conclusions of Gass. He uses Exhibit 49 to illustrate his point and which the Court perceives is wholly out of proportion as it relates to the rebuttal testimony; the Court was finally convinced that the witness is all things to all people in this case, in that he was called upon to touch upon just about every iota of evidence offered by claimant. He, of course, addressed himself to Gass, Jukes, Jensen and Upson, all of whom are hereafter discussed. The Court's notes indicate that when the witness had finally completed his testimony, it was thought he had lost his objectivity and the thrust of his principal testimony in support of Crump was in doubt.

In addition, Dr. Joseph Rodrick was called as a rebuttal witness in the interest of confirming Crump and Doull (hereinafter noted) and to offset Jukes, Jensen and Gass. His experience in DES is limited; he takes time to attempt to explain the toxicological difference between DES and estradiol (Ex. 29). He confirms that if we are dealing with .02 ppb in the kidneys and extrapolated to .002 parts in the meat, this involves consumption in the aggregate of 150,000 pounds of beef. The Court's impression was that this witness, again, is another catch-all type who was brought back to touch base as opposed to every witness offered by the claimant. He was partisan personified.

Dr. William Hobson, the Director of Primate Research Institute at New Mexico State University, was called. His field is reproductive biology, that is, the reproductive processes in animals. He discusses the hormone system, which controls muturation, i.e., development early in the fetal life through puberty. He uses primates in his research, be-

ing the closest available animal model of man. He was interested in the effect of estrogen on the reproductive development in primates and DES is a known potent estrogen. Normally, he presents DES to the animals in a daily dose, depending on the age of the animal. He is interested particularly in two hormones which control reproductive development, luteinizing hormone (LH) and follicle-stimulating hormone (FSH). He is looking for a "no observed effect" level, being a level at which he fails to find a statistically significant effect as opposed to a "no effect" level, which is one wherein he is reasonably certain actually had no effect. He reviews Exhibit 53, being a graph of follicle-stimulating hormone in infant rhesus monkeys, which describes levels in the serum of infant rhesus monkeys treated from the day of birth with 50 micrograms of DES per kilogram of body weight per day (50 mcg/kg). In his judgment, administration of DES completely suppressed levels of follicle-stimulating hormones when compared with similarly treated controls. Exhibit 56 is intended to explain conversion from DES dosages at this level to levels of DES in parts per trillion in human food. Considering the weight of the monkeys, i.e., 2.2 pounds and DES dosage for that kilogram of weight, this converts to 3.0 ppb. This further includes a two-thousand fold safety factor, i.e., the dosage for the monkeys would be two-thousand fold higher than 50 mcg/kg, i.e., 6,000 ppb. As relates to meat intake, a factor of 500 grams consumption per day is considered. This converts to a pound and two ounces of meat, and assumes a human weighs approximately 130 pounds. Simply stated, if the witness's tests were converted to beef with a comparable amount of DES in it, it converts to 6,000 ppb DES. While the witness proceeded, the Court pondered his own responsibility to apply that which is reasonably possible, and notwithstanding the serious effects known from

excessive consumption of the compound, retained reservations as to realistic applications here. Turning to the effect of DES on LH levels in infants from the date of birth, which engages a lower dosage level, i.e., 60 ppb, an elevation in the luteinizing hormone in both sexes of the monkeys, particularly females, was noted, i.e., sex skin swelling. In summary, the lowest level fed, being 6 ppb without a safety factor, is interpreted as follows:

A All right. This calculation of what we would predict would be a safe level of human exposure in the meat consumed is based on the assumption that we are starting at a level at which we did not observe an effect. Now, I am not confident at this time that we have reached such a level. The lowest level we have fed is 0.05 micrograms per kilograms, and it appears to me that we're beginning to observe an effect.

THE COURT: Which is six parts per billion?

A Which is six parts per billion without the safety factor. Yes, sir.

Dr. John Doull, a professor of pharmacology and toxicology and who directs the Poison Control Center at Kansas University Medical Center, was next called. His specialty is in the field of toxicology, i.e., the study of adverse effects of drugs. He has worked with Dr. Crump and acknowledges risk assessment as a valid function in the field of toxicology. He states that toxicology does include extrapolation from animal results in that it is both a science, i.e., method of accumulating data, and an art. In predicting from his data base, the toxicologist's mechanism to indicate his uncertainty is his "safety factor." The size of the safety factor is dependent on his confidence in his data base in relation to predicting for other species. To

characterize toxicity, he needs to know the adverse effects that might result and the dose response data. He is aware of enough data to have no doubt that DES is a carcinogen. In addition, DES has teratogenic effects in humans and animals. The existing toxicology data base for DES did not enable the calculation of a safe level in human food and he takes care to explain the procedures he would require. On the strength of his studies, not necessarily his own testing, and accepting the Gass studies, it was his conclusion that there are no "effect" levels on this material and one cannot go on the safety factor route. In other words, there is a "no observed" effect level. It was obvious that the government was focusing considerable attention to the witness in the interest of bringing to bear ultimate conclusions relating to its burden. In this regard, as a preface to his ultimate findings, the witness acknowledges that the existing toxicological data base for DES does not enable a calculation of a safe level in human food. This is not to say that the witness believes that there is not, simply that it has not been established. Perhaps as a contradiction, he further acknowledges that science uses a lot of carcinogens in medicine and wherein the benefit outweighs the risk. Certainly, as the compound exposes humans to carcinogens in a non-medical situation, there is a cardinal rule that you do not expose people to a noxious agent unless you have the full spectrum of information from animal studies. He discusses synergism as the enhancement of response getting a greater effect by adding effects of two agents. While DES has some estrogenic characteristics, it is not the same as estrogen produced in the body. In the final analysis, and while he would probably eat the meat in question, he would hesitate to advise someone else to eat it, his ultimate opinion being that consumption of the beef in question would be harmful or injurious. This gentleman was, indeed, the government's most impressive

witness. In this connection, the Court interjected several of his own questions in the interest of clarity. A review of some best reveals the state of the government's case at that point in time:

Q And your testimony as to the risk and the potential hazard to the consuming public is based, again, upon that factor and not upon the marketing of this 154,000 pounds of muscle being held in this court? You have made no risk assessment with respect to the consuming public for a one time consumption of this product, have you, sir?

A True, because it's my understanding that, you know, what you are asking me as a toxicologist is to speak to the risk associated with the long term low level exposure. Now, if you are asking for an assessment of the toxicological risk following one acute exposure, I would have a different toxicological evaluation.

THE COURT: What would that be, Doctor?

A I beg your pardon?

THE COURT: What would that be?

A At the levels that we are talking about, it would be far less — I probably wouldn't be terribly concerned about that kind of exposure. I guess I would have to hedge on that a little bit because it would depend on who I was making that recommendation to. If I were a regulator making that recommendation, I would be a little concerned.

Q You see, Doctor, I sincerely — please understand that I appreciate that, and I appreciated that distinction this morning on your direct. A regulator having to build in these safety factors and look at the face

side of the question marks has one duty and one obligation and one evaluation and one conclusion, as opposed to what we have now arrived at here, is that not correct?

A Yes. He has a –

Q Different duty?

A The toxicologist shares in that when he shares in the responsibility for making that decision, and in those cases the toxicologist tends to be more conservative.

Q But, you see, I think the clear distinction here is a moment ago when you used the phrase, 'If you have asked me to come here and give you my opinion as a toxicologist with respect to the long range effects of continued,' et cetera, et cetera, et cetera, 'my opinion is one thing.' I want the record to show, Doctor Doull, that I am confident that that's what the plaintiff, the United States Government, has asked you to come here to do, to give that opinion. The opinion that I elicit or hope to solicit from you is your opinion not wearing that regulator's hat, building in all of the factors that the toxicologist must of necessity build in when he is advising a regulator. I am getting down to the facts in this case and these 154,000 pounds of beef.

A Well, my response – you had asked me about the difference in hazards associated with what we have been talking about, which is repeated exposure versus the single exposure. And my response would be that there is less hazard from a single exposure at the kind of levels that we are talking about than there would be from the repeated or chronic exposure.

Q Would it be fair to modify the term 'less' with "significantly less"?

Q That's reasonable. The hazards are appreciably less.

Q Now Doctor –

THE COURT: I would be concerned, Doctor, any exposure reasonably.

A Well, it's very difficult to exclude – absolutes are difficult. There is a body of scientific evidence which indicates that there is no bottom line for cancer; that a single molecule of a substance can cause cancer because it can react with the DNA and can cause cancer. If one subscribes to that no threshold idea, then what that really means is that there is no safe level for DES and even a single exposure would have this DNA effect and could cause cancer.

Q And do you subscribe to that, Dr. Doull?

A No, I don't. I think for DES, for example, there probably is a safe level. I think that the studies we have now have not really established that, and I think that we need some additional work in multiple species to tell us what that level is. I think if we had that level, we have a perfectly straightforward position to move ahead and do regulatory things on the basis of that level. This is a hypothetical on my part that there is a safe level for DES, but I think the evidence points someone somewhat towards that if you look at Dr. Gass' study. For example, his lower dose levels are beginning to fall apart, which indicates, 'I may be getting fairly close to threshold.' The other scientific evidence which suggests that also, so that's really what kind of leads me to the

idea that there probably is a safe level and we just haven't proven what it is.

And further:

THE COURT: Let me stop you. The thing that obviously bothers me here in weighing this, knowing that, appreciating, as well, what you have here is, in effect, some tests on some mice and what would appear to me perhaps to be some one day old monkeys that would appear to me to have been injected or ingested with what has to be an inordinate amount of DES, six point plus-type injection. No one is suggesting that the implanted beef or the livestock industry or Mr. Lackey or anyone else — ingestion of that kind of quantity. You see, you have now said maybe there is or probably is a safe level.

A The problem is that the kind of tests one has to do to demonstrate safety are precisely that kind of test. We use very large doses.

THE COURT: You mean on the mouse.

A For a full life time. We put the animals under tremendous stress in a sense in the hope that by emphasizing all the adverse effects, we will, in fact, be able to detect those. The argument is then by using those very unreal conditions we find the things we have to worry about in man. My concern is not really the hazard of DES; my concern is that we have not failed using the proper toxicological procedure to demonstrate that it is safe. (sic) And I have looked hard at the data and I simply cannot be convinced that we have done the necessary scientific steps that we need to take to prove that that material is safe. It's the same for any chemical agent. There is a

> number of things that one has to do to provide the best proof scientifically that we can that it is safe, and all of the elegant things that we do with DES and other chemicals have no bearing on that question when, in the final analysis, it's a question of can we pr[illegible]e that it is in fact, safe, and we haven't done those te[illegible]ts.

Upon completion of this testimony and the government having rested, the Court's perspective of the case, at that point in time, gave rise to its confidence in the government's claim, certainly with some assurance as to its merit. Indeed, first impressions garnered through the course of the case to this point supported rather stringent remarks extended to the claimant's counsel at the time of its motion to dismiss, which was overruled. Now, with reflection of all of the evidence, it should be noted, the Court's regret, that his remarks were so extensive. Now, having perceived the full thrust of this case, both sides, they were doubtless unduly devastating to the claimant and perhaps unduly encouraging to the government.

Claimant's case opens with the presentation of Dr. George H. Gass. This gentleman was Director of Endocrinologic Pharmacology Research Laboratory and professor of physiology in the School of Medicine at Southern Illinois University. Doubtless he is best known for his 1964 studies which identify the carcinogenic effect of DES in mice. In this, it should be noted that throughout the course of the government's case, the Court, perhaps naively, has pre-supposed that its witness evaluations of the Gass report (Ex. 11) were not necessarily in conflict. Certainly, the thrust of most relevant opinions (Crump, Doull, Andrews, Condon and Rodrick) are geared to their interpretation of these findings and this study. Now appreciating the intensity of the issue, it came as no surprise

to receive Dr. Gass as claimant's witness. Without reservation, this gentleman has come to testify as to his complete rejection of the conclusions drawn by the government throughout the course of their entire dealings with DES and as it relates to his study and findings. It would appear that this case is the first forum for this gentleman to so vividly express himself, and upon completion of his testimony there was no question in this Court's mind but that he does, indeed, reject the government's underlying thesis. It is his testimony, and has always been his belief, that the 6.25 ppb result in the C3H positive field mice is an aberration and not indicative of the fact that DES is a carcinogen at that level. He insists that his interpretation that the dose response curve is linear has always been ignored. He does indeed believe there is a "no effect" level and it is his opinion that there is no tumorogenic effect at less than 25 ppb, and then only as female C3H mice reflect. He testified that: "If DES has any carcinogenicity, that its' threshold is somewhere about 25 ppb." He testified further that there is no risk of harm to any person from consuming beef containing DES at the level involved here.

At this juncture, and for the first time, evidence is now before the Court which directly controverts the government's thesis. The obvious quandary now is, whom to believe, and why. Doubtless a determination of this matter probably is a most decisive factor in deciding this case. While the government argues that others are equally entitled to draw objective findings from the Gass study, and indeed they are, it is this Court's judgment that the scientist who has conceived the test, established the criteria for the test, conducted the test, inherently has such a "feel" for the experiments and findings that his opinions are entitled to considerable weight. By way of corollary, it strikes the Court as a circumstance akin to now having some third

party designated by the government to replace Mr. Spiller for the purpose of argument. This young gentleman is probably as conversant with the field as any lawyer in the country. He assisted in the DES hearings, he assisted here in the preparation and trial of this case. He has been chided informally with the Court's corollary as relates to reception of Dr. Gass' testimony – "who knows best?" In this, the Court adopts Dr. Gass' testimony as the most reliable as it relates to the interpretations and findings of his study. This is not to say that this Court dares establish as a matter of law, with any precision, a "no effect" level, but to suggest that it is the Court's finding that there probably is one, grossly in excess of .02 ppb in kidneys of the cattle.

Next, the claimant focuses its defense to the government's biostatistic extrapolations and opinions and presents Dr. Thomas H. Jukes, professor of medical physics, University of California at Berkeley. He has worked extensively in the field of nutrition and in the field of cancer chemotherapy. He is a medical biochemist. This gentleman is an obvious and outspoken protagonist for the use of DES in livestock and has been most vocal in his opposition to the movement of the Food and Drug Administration to ban its use. It is reasonable to acknowledge that from the outset, the witness was perceived as partisan for the claimant's cause as some have been for the government. As this courtly gentleman proceeded through his testimony, however, and certainly in his response to sharp cross-examination and the Court's query, the full impact of his testimony began to come through. His experience exceeds any suggested by the government, at least as it relates to the compound in question; his adamancy was convincing. His examples of the use of certain chemicals with known toxic effects, i.e., vitamin D, insulin, salt, were enlightening and reassuring. By example, natural

estrogens are carcinogenic. He clarifies considerable supplies of estrogen are from plant food such as wheat germ and soybeans, all green vegetables, vegetable oils, pointing out that none create an adverse effect on the consumer because the amounts of estrogenic substances consumed are at levels below the injurious level. He is convinced there is a safe level for DES and endorses Dr. Gass' opinion as to the Gass report. He clarifies further that arsenic is a known human carcinogen and the body has inherent in it a level of arsenic at an obvious no effect level. As relates to DES, it is not cumulative in the body because it is metabolized and excreted, and if the period of withdrawal is lengthened, its level in the body diminishes. The compound is not cumulative nor does it have a cumulative effect in the body. It is his judgment that one microgram per day of DES is quite safe. This is one millionth of a gram, i.e., one part per billion of DES would contain one microgram per kilogram. One part per billion is one nanogram per gram, or one milligram per ton. Referring to kidneys, .02 ppb represents a something less than one ounce in a million tons. .002 ppb, if in the meat, represents 2 grams in a million tons of muscle, or 1/15 of an ounce in a million tons. 6.25 ppb is 3,000 times as much as .02 ppb. Simply stated, if we were dealing with a million tons of meat to market to the consuming public, there would be 1/15 of an ounce of DES in the whole. The witness is asked to comment with regard to the thesis that one molecule of even a known carcinogen can cause cancer, to which he concluded that it is utterly impossible because the body contains known carcinogens at a molecular level. By example, the body contains 34 million molecules of arsenic. Cadmium occurs about 50 times the level of arsenic.

In the final analysis, taking into account all of the evidence at hand, it is the witness' opinion that there is no

possible risk to the American public in the consumption of the beef in question. At a later point in these proceedings, the witness was addressed by the Court to express without interruption his explanation of this opinion. His response was most convincing. Now having at hand an occasion to again review his testimony, this view is reconfirmed; the Court now convinced that the government has failed its burden of proof. In addition, it would appear that consumption of the beef in question would injure no one.

Dr. Dan W. Upson, a professor of pharmacology and veterinary medicine at Kansas State University, was endorsed by the claimant at the time of the motions for summary judgment, and on the strength of his statements as of then, the Court acknowledged the divergency of factual contentions as relate to the use of DES and its effect to the consuming public. While it may be that this gentleman does not meet the technical requisites insisted upon by the government representatives, in the Court's view his extensive education, training, experience, including that with DES and of course with animals, most convincingly supports the basis for any opinion in this field. In the Court's view, he is a most refreshing, logical and believable witness. As one weighs his responsibilities in the test of evidence at hand, the Court is quite comfortable with the ultimate opinions of Dr. Upson and they are accepted as fact in this case. Indeed, his testimony is wholly corroborated by that of others, both from the government and for the claimant, the thrust of which is to reiterate the gross improbability, if not physical impossibility, of harm to anyone in the consumption of the beef in question.

The witness reviews that, with respect to most chemical substances, there are usually three levels of effect. First, a "no effect level;" second, a "beneficial level;" and third, a "toxicological level."

The witness testified with respect to the intended physiological effects of an estrogen, i.e., to bring about a multiplication of cellular growth. He described the proliferative stage of the estrogen cycle (in the cow 21 days, and in the woman 28 days), and stated its purpose is to prepare the tubular portion of the reproductive tract to receive new life and to induce the mammary gland to produce milk.

The witness corroborates Dr. Jensen, whose testimony is hereinafter reviewed, and concludes that there is no affinity in muscle for estrogens. They simply do not find a receptor "home" in muscle.

He testified that he is familiar with the Aschbacher and the Rumsey studies, and that nowhere do they state that DES is present in muscle. He acknowledged that they indicate that 14/C is present in muscle at a slight level, above background, but testified that this does not stand for the premise that DES is present.

He testified that with exception of some allergic reactions to penicillin which remained in the milk of cows after being treated with penicillin, there are no recorded adverse reactions or human health hazards shown to have been caused by *any* residue from animal drugs.

Dr. Upson evaluated the "worst case," assuming the government's premise that DES is present in the muscle at a level of .015 ppb, which he specifically rejected. However, for the sake of discussion, he calculated the total amount of DES which would be present in the entire 154,000 pounds of muscle, assuming a level of presence of .015 ppb (15 ppt) and conclude that it would amount to 1.0888 mg DES total ingestion, if one were to eat it all. See Claimant's Exhibit DDD. (It should be noted that Dr. Up-

son used a "rule of thumb" ratio of 30 grams per ounce in his computations, whereas there are only 28.349 grams per ounce. This would reduce his calculations to approximately 1 mg).

> As an aside, the witness' classroom experiment brought home to this Court the reality of this central issue. In this, it is to appreciate that if .02 ppb to .15 ppb DES is found in the kidney, thereafter extrapolating at most .002 ppb to .015 ppb in the meat represents consumption of 154,000 pounds of meat.

If reason, i.e., common sense, has its place in the decision of this case, such a proposition defies reason. It was Dr. Upson's ultimate opinion, that there is no way anyone can consume, regardless of his condition, any portion of the beef in question and be injured.

Lastly, the claimant presents the testimony of Dr. Elwood W. Jensen, whose degree is in organic chemistry. He is the Charles Huggins Professor of Biological Science at the University of Chicago and the Director of Ben May Laboratory for Cancer Research. Without further resume of the witness's qualifications, it is to note that this Court considers Dr. Jensen as the most persuasive and impressive of any witness called in this case — either side.

After some foundation, the witness lectured the Court with regard to certain basic rules of chemistry, and of paramount importance, the "law of mass action."

It is his judgment that estrogens contribute to a carcinogenic process in a susceptible system, such as the C3H mouse, only indirectly, and not directly. The C3H mouse is preprogrammed to be likely to develop cancer, noting that thirty to forty percent of the animals develop cancer

even without administering estrogen. It is his judgment that DES and/or other estrogens are not true carcinogens because they only give an added push to a system that is predisposed. In analogous systems, similar effects are not noted. If DES were a true carcinogen, it follows, it shouldn't make any difference. Estrogens are permissive factors rather than causative, i.e., they allow things to go on but do not cause them. The witness believes that DES interacts with the protein activator in a cell in an identical manner as natural estrogen does. He suggests that there is no evidence that this identical reaction results in any adverse reaction where the estrogen is DES as opposed to a natural estrogen. It is his judgment that essentially every substance will have a toxic dose if you go high enough; even the most innocuous substance as water. For natural regulators in the body, there will be three levels: first, a level where there is not enough of the agent to cause any effect; second, a level where you increase the dose to reach a normal, natural response; and third, when you go higher you come to a level resulting in deleterious side effects.

Of paramount importance, however, is the witness's explanation of what goes on in the cell as a hormone acts. Estrogen, be it DES, estradiol, or estrone, goes into the nucleus of a cell but it doesn't go in and stimulate the nucleus. Tissues which need estrogen have in them a specific protein which is called an estrogen receptor. Estrogen reacts with the receptor to form a complex. Cells that respond to estrogen stimulation contain considerable protein receptors. The estrogen binds with the receptor, causing a change in the protein, which is called an activated receptor. In other words, interaction of estrogen and protein receptors makes an activated receptor — form a complex — and is independent of concentration. This binding is reversible and will have a tendency to

disassociate again. If the system is diluted, separating estrogen from the receptor and forming a lower concentration, it is not biologically functional. At low levels, the hormone will be "out there" without a receptor, and will be inert. In other words, until you have a sufficient concentration of estrogen molecules to encounter a receptor, *nothing* happens. At very low concentrations, the hormone will be unbound to the receptor. It is the witness's opinion that low amounts of estrogen, not finding a receptor, biologically have no effect; there will be a "no effect" level. In this regard, it should be noted that aside from Dr. Jensen, each witness has seemingly drawn an ultimate opinion from conclusionary findings, either for themselves or from others. This witness distinguished himself from the others in that as opposed to them he relates his opinion to a physical phenomenon. It is the Court's opinion that as one would quest for truth, comfort comes when physical evidence controls the opinion. It may be that Dr. Jensen's otherwise uncontroverted testimony is scientifically provocative; it is accepted here as valid.

It was the witness's opinion that there is no conceivable possibility that DES, present at the levels suggested in this case, would have any adverse effect or pose any threat whatsoever to the health and safety of any member of our society, whether consumed in a single meal or whether they continued to consume this on a daily basis (200 grams per day). Specifically, the consumption of the meat, DES ingested even at the alleged level of the kidney here in question, there is not the remotest possibility of injury to anyone. To reach a conclusion, the Court need not confirm as a matter of law, the physical impossibility of harm to anyone other than to note that in the final analysis, Dr. Jensen is probably right.

Accordingly, in addition to certain stipulations of fact and admissions submitted by the parties, the findings and conclusions as noted in the foregoing resume are deemed to be findings of fact and conclusions of law as required under Federal Rules of Civil Procedure, Rule 52. In summary, and specifically, as relates to 21 U.S.C.§ 601(m)(1), the Court finds that the plaintiff has failed in its burden of proof to establish that the beef in question is adulterated. In addition, it is the Court's conviction and finding that the evidence overwhelmingly suggests that this beef is not adulterated.

The Secretary's Opinion

Throughout the course of this matter, government's counsel has reminded the Court that notwithstanding the findings as now announced above, the Secretary's opinion is paramount — a mandate so to speak — and from which there is no escape. It has been suggested that no matter how unreasonable the Secretary's opinion strikes the Court, the same is binding here, nor is it reviewable!

For the purpose of these findings, it should be first noted that the Court holds the Secretary of Agriculture in the highest regard and is well aware of the judicial responsibilities attendant to his opinion. Conscious of these duties, this case commenced, the Court ever sensitive to the significance of his opinion and with no reason to question its propriety. While perhaps wholly naive, the Court notes that it came as some surprise to learn that this opinion is not a personal one at all. In other words, Secretary Bergland, now Block, has no personal involvement in the opinion involved here, the same having been administratively delegated unto the Administrator of the Food Safety and Quality Service, 7 C.F.R. § 2.15(a)(2)(iv); *id.* § 2.92(a)(2)(iv).

In the present case, the Secretary's judgment with regard to meat containing DES is to be found in remarks in the Federal Register prefatory to the "Explant program" regulation. (Ex. 69). Specifically, this document states in relevant part:

> FSQS considers animals treated with or exposed to a substance that may impart a biological residue which would make the edible tisues of the animals unfit for human food or otherwise adulterated under the Federal Meat Inspection Act [21 U.S.C. 601(am)].
>
> * * * * * * *
>
> FDA and FSQS are working closely together . . . to eliminate the illegal use of DES and to require the reconditioning of animals, to which DES has been administered at feedlots, to make them fit for use as food. . . . FSQS bases its action on FDA's determination that removal of a DES implant followed by a withdrawal period of 41 days . . . is necessary to recondition the animals to make them fit for use as food. 45 F.R. 28947, 28948 (Apr. 22, 1980).

Reserving comment as to the propriety of this opinion, we will first address claimant's argument that the notice provisos relating to the implementation of the "opinion" are deserving of consideration. These contentions address themselves to the applicability of the Administrative Procedure Act as set forth in 5 U.S.C. § 553, as opposed to §§ 701 through 706, which deal with judicial review. Indeed, mindful of the Court's comment, as more specifically set forth in pages 19 through 20, certainly being aware

as to what purports to be an uneven enforcement and most assuredly a test of due process, these contentions are deserving of review.

In the interest of clarity, some breakdown of the factual resume of events is in order, the salient aspects to be as follows:

April 16: FSQS Administrator signs document containing explant regulation and "Secretary's Judgment." (Ex. 69).

April 17: Lackey beef slaughtered. Rousseau suspects illegal implants – retains beef.

April 21: Document filed at Federal Register Office.

April 22: Document published in the Federal Register.

April 23: Meyers tests ear implants, discovers they contain DES.

April ?: Decision made to bring condemnation action.

May 14: Condemnation action filed in this court.

With this in mind, some historical resume is in order:

The Meat Inspection Act confers upon the Secretary of Agriculture authority to prescribe rules and regulations for the effective administration of the Act. e.g., 21 U.S.C. § 621. When the Secretary of Agriculture exercises his statutory authority to set standards and prescribe conduct under the Meat Inspection Act, he "must do so in accordance with the substantive rule making provisions of the APA." *Community Nutrition Institute v. Butz*, 420

F.Supp 751, 754 (D.C.1976). The published rules and regulations of the Department of Agriculture acknowledge that the agency, when acting under the authority conferred by the Meat Inspection Act, is constrained by the Administrative Procedure Act. See, e.g., 35 F.R. 15552. Rule making procedure under the Administrative Procedure Act is governed by 5 U.S.C. § 553.

The Act's notice provision, 5 U.S.C. §552, provides that all substantive rules of general applicability adopted by the agency as authorized by law and all statements of general policy or interpretation of general applicability shall be published in the Federal Register. Except to the extent that a person has actual and timely notice of the terms of such a matter which is required to be published, the person may not in any manner be required to resort to or be adversely affected by, a matter which is required to be so published. 5 U.S.C. § 552.

The claimant contends that the rules and regulations of the FDA enacted under authority of the Food, Drug and Cosmetic Act are irrelevant for purposes of enforcement of the Meat Inspection Act. Rules and regulations must be adopted by the Secretary of Agriculture or his delegate, the administrative officials designated by law. 21 U.S.C. § 601(a), and with this the Court concurs. Although the meat act grants the Department of Health and Human Services limited detainer authority under 21 U.S.C. § 679(b), it does not confer upon that agency power to adopt regulations under the Meat Inspection Act. The Secretary of Agriculture, although cooperating with the Secretary of Human Services, must adhere to the independent construction of the two acts. "There is no requirement in the Federal Meat Inspection Act that any procedures prescribed in the Federal Food, Drug and

Cosmetic Act be followed in issuing regulations or taking other actions under the Federal Meat Inspection Act." 35 F.R. 15553. Regulations enacted under the Meat Inspection Act are inapplicable in defining adulteration under the Federal Food, Drug and Cosmetic Act. *United States v. Articles of Food, etc.*, 456 F.Supp 207 (D.Neb.1978). Similarly, regulations enacted under the Food, Drug and Cosmetic Act are inapplicable to proceedings under the Meat Inspection Act. *See id.; see also Grand Laboratories, Inc. v. Harris,* 488 F.Supp. 618 (D.S.D., S.Div., 1980), Food Drug Cosmetic Law Reports, CCH ¶ 38,030.

It would appear that there were no regulations of the Department of Agriculture in force on April 17, 1980, through which the Secretary exercised his discretion and determined that DES was a harmful or deleterious substance within the meaning of the second definition of adulteration. 21 U.S.C. § 601(m)(2)(A). The Food and Drug Administration, on July 6, 1979, had revoked regulations regarding the use of DES as an implant or a feed additive. (See 44 F.R. 39387, which revoked 21 C.F.R. §§ 522.640 and 558.225, and amended 21 C.F.R. §§ 558.76 and 558.78). The Secretary of Agriculture, through his delegate, the Food, Safety and Quality Service (FSQS), on October 16, 1979, removed regulations regarding certification of withdrawal periods for DES *fed* cattle. (See 44 F.R. 59498). The FSQS Administrator took that action because of FDA's revocation of the NADA's for DES. The Department of Agriculture had never adopted or published a testing method to detect DES residue and has never issued in The Federal Register regulations addressing use of DES implants.

It was not until April 22, 1980, that the Department of Agriculture issued a final interim rule again bringing DES

within the regulatory framework of the Meat Inspection Act. 45 F.R. 26947. This final interim rule, effective April 22, 1980, provided for an explant and reconditioning program for animals which had been implanted with DES after the effective date of the ban, November 1, 1979. The order also reinstituted the FSQS National Sampling Program. However, because the FSQS final interim rule was not effective until April 22, 1980, and was not published in the Federal Register until that date, its provisions are inapplicable to the present proceeding. See 5 U.S.C. § 552. In addition, in the absence of such rules, it would appear that there were no FDA rules and regulations with respect to DES in force on the date of the instant slaughter and seizure. In the absence of such rules, it is the claimant's position that the meat and offal may not be legally condemned under 21 U.S.C. § 601(m)(2)(A).

Moreover, biological residue regulations were in force on April 17, 1980. *See* 9 C.F.R. §§ 301.2(zz) and 311.39. However, the definition of biological residue makes no specific reference to DES and is not sufficiently precise to provide a basis for the exercise of the Secretary's discretion in the present action. "A statute which is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. This rule applies to regulations." *Brennan v. Occupational Safety & Helath Rev. Com'n*, 505 F.2d 869, 872 (10th Cir. 1974).

"Statutes [and regulations] prescribing penalties, civil or criminal, must be drafted without ambiguity." *Paccar, Inc. v. National Highway Traffic Safety*, 573 F.2d 632, 645 [9th Cir., *cert. denied* 439 U.S. 862, 99 S.Ct. 184, 58 L.Ed.2d 172 (1978)]. Due process requires that regulations be drafted without ambiguity. *Paccar*, 573 F.2d at 645, 646.

The deficiency of the biological residue regulation is readily apparent when it is compared with precise regulations stating substances which may be used in meat product preparation (9 C.F.R. § 318.8) and which adopt the FDA standards for pesticides, food additives, and color additive residue (9 C.F.R. 318.6). For example, scientists agree that a high level of DDT in consumed food may be harmful. To protect the public from harmful levels, the FDA has established tolerance levels for DDT use in various raw agricultural comodities, including fruits, vegetables, and meat. Different levels of tolerance for different foods are prescribed because it does not follow "that a level which is either safe or unsafe for one food would be equally safe or unsafe for another food." *United States v. Ewig Bros. Co., Inc.*, 502 F.2d 715, 718 (7th Cir. 1974), citing 40 C.F.R. § 180.147. Likewise, permissible residue levels vary with the nature of the residue. See 21 C.F.R. §§ 193.10 to 193.460.

The Meat Inspection Act biological residue regulations fail to identify residues or to establish any tolerance levels. In the Court's view it is impermissibly vague for a regulation illuminative of the Secretary's discretion, in the present proceeding, in defining DES or other residues as either deleterious or injurious, or that food products alleged to contain miniscule amounts thereof are unfit for human food.

Claimant further contends that red meat cannot be condemned as adulterated as defined by § 601(m(1)(A) where there is no applicable regulation by which the Secretary finds DES is either deleterious or harmful. The Court concurs. The Secretary gave claimant *no notice* that the presence of DES residue would render its meat subject to seizure. Past actions by the Secretary in allowing DES implants, and in permitting the marketing of meat implanted

on or before October 31, 1979, but denying the marketing of meat implanted November 1, 1979, show that the Secretary's proceeding under this definition of adulteration would be arbitrary, irrational and capricious, and punitive. Until the FDA revocation of DES NADA's, steers implanted with DES were monitored for excessive residue through post mortem examination of livers. *Even when this examination revealed a measurable residue, the red meat from the animal was not deemed adulterated and was not withheld from sale as government approved meat.* May the Secretary without publication of rules or regulations reverse his position on April 17, 1980? DES implanted steers had not been deemed adulterated prior to that date. Due process of law does not permit such an arbitrary and capricious change in position without notice and without precise regulations based upon substantial evidence. Regulations regarding DES implanted steers were not issued by USDA until April 22, 1980, when FSQS, as an emergency order, issued its explant regulations. 45 F.R. 26947.

The rule making procedure applicable in defining a poisonous or deleterious substance under definition two [21 U.S.C. § 601(m)(2)(A)] takes the place of proving injuriousness to health under definition one. [21 U.S.C. § 601(m)(1)]. Rules adopted and published in accord with the APA provide a forum for evaluation of scientific data and determination of potential harm. Directly affected persons have an opportunity to appear and standing to challenge an adopted rule. These safeguards limit agencies' propensities to be arbitrary and capricious, and give form to Congress' broad delegation of power. They prevent the prospect of declaring harmless substances as deleterious or poisonous. Without this rule making procedure conducted by the Department of Agriculture, there has been no rele-

vant forum to determine the alleged hazard, or probability of presence, of DES residue. A determination of adulteration cannot now be entered solely upon the Secretary's assertion that DES residue may render the meat unsafe as human food. Nor can the Secretary of Agriculture rely on the administrative hearing record of the FDA in considering the revocation of the FDA NADA's.

In summary, the Secretary of Agriculture had not, through published order or regulation, as of April 17, 1980, given notice of the exercise of his alleged discretion in finding the red meat of DES implanted steers to be adulterated within the meaning of 601(m)(2)(A). Absent actual notice of the April 22, 1980 order, the order is ineffective pursuant to 5 U.S.C. § 552. Without an enforceable rule or order, the Secretary's attempt to deem the detained red meat and offal adulterated because of the possible presence of DES residue is arbitrary and does not comport with due process. The imprecise biological residue regulations are unconstitutionally vague as a basis for application of the second adulteration definition. Because of the absence of valid rules or orders confining the Secretary's discretion, 21 U.S.C. § 601(m)(2)(A) is constitutionally defective as applied to the present proceedings. To meet its burden of proof the government must prove that there is a *reasonable* possibility that the seized meat is potentially injurious to health. An attempt to short circuit this burden of proof is impermissible.

The claimant further urges that unfitness, as defined in the opinion, is a finding independent of that of injuriousness and deserving of comment. In this, the more problematical element of the definition is the phrase that the substance be one which "may in the judgment of the Secretary make such article unfit for human food." The first question presented is the congressional purpose in

authorizing the Secretary to determine *unfitness*. Claimant contends that unfitness cannot be equated to injurious to health; for, if it were, the first and second definitions of adulteration would be indistinguishable. Further, unfitness is not equivalent to unsafe; the standard of unsafety is used in definitions (2)(B), (2)(C), and (2)(D), but not in (2)(A). Additionally, unfit cannot mean filthy, putrid or decomposed, as then the second definition of adulteration would be equivalent to the third definition. Using the same reasoning, the added substance which may render the article unfit cannot be one added to increase the product's bulk or weight, or to reduce its quality or strength, or to make it appear better or of greater value than it is, as these conditions are included within alternative definitions of adulteration.

The Food, Drug and Cosmetic Act of 1938 utilized the term "unfit for food" in its definitioin of adulteration. 21 U.S.C. § 342(a)(3) (1983). *United States v. 24 Cases, Etc.*, 87 F.Supp. 826 (N.D.Me.1949), construed the term "otherwise unfit for food" in light of the congessional purpose. The Court concluded that the phrase must have a meaning independent from filthy, putrid, and decomposed, different from abnormal odor, taste, or color, and independent of injurious to health. "Otherwise unfit for food" was construed by the Court as strengthening and enlarging the intended scope of the coverage of the food act. Under the facts of *United States v. 24 Cases, Etc.*, the Court found canned herring roe unfit food because it was excessivley *tough and of rubbery consistency*. The determination whether the product is so tough as to be unfit for food, "is solely a factual one, and must be determined by the Court in a trial on the merits." *United States v. 24 Cases, ETc.*, 87 F.Supp. at 828. The standard is one which an average person, under ordinary conditions, would use

when finding food not suitable for chewing and swallowing. *United States v. 449 Cases, ETc.*, 212 F.2d 567 (2nd Cir. 1954), also discusses unfitness.

Claimant submits to the Court that Rodney E. Leonard, then Deputy Assistant Secretary of Agriculture, when testifying regarding the Meat Inspection Act before the House Subcommittee, was questioned regarding the definitions of adulteration in proposed H.R.6168. Mr. Leonard stated:

> What we are trying to do is make our definition consistent with Food and Drug language so we are not applying one standard to meat and have another standard apply to other products. (Testimony, July 26, 1967, p. 34).

Indeed, the definitions of adulteration pursuant to the two acts are nearly identical. However, the problem phrase in 21 U.S.C. § 601(m)(2)(A), regarding the judgment of the Secretary, is not included within the parallel definition of the Food, Drug and Cosmetic Act, 21 U.S.C. § 342(a)(2). Additionally, no similar discretion was ever granted to the FDA pursuant to the added poisonous or deleterious substance definition, [342(a)(2)] under the 1938 enactment or amendments thereto.

Mr. Leonard did testify as to the agency's desire to specify adulteration in detail:

> I think it is also to the advantage of the processor, or manufacturer, if we try to spell these things out as specifically as we can so he knows what he is dealing with. Otherwise, he would need counsel all the time because the department or the agency could more or less specify what

> adulteration meant as it went along. (House Subcommittee, July 26, 1967, pp. 34-35).

Broad ad hoc exercise of the discretion granted to the USDA by 21 U.S.C. § 601(m)(2)(A) would be inconsistent with this stated desire to define with specificity. Indeed, claimant urges that processors and manufacturers would be subjected to intolerable uncertainty if the Secretary's discretion could be exercised without rule making proceedings by the USDA, or implemented with prior notice.

In light of the foregoing, claimant suggests perhaps the discretion granted by § 601(m)(2)(A) was intended to provide a means to extend the definition of adulteration, through proper rule making procedures, to then unanticipated developments which might later be found through adequate testing to render meat unfit. It is noteworthy, however, that when the second session of the 90th Congress adopted the Animal Drug Amendments of 1968, P.L. 90-399, amending the Food, Drug and Cosmetic Act, no concurrent amendment was made in the Meat Inspection Act. [Compare 21 U.S.C. § 342(a)(2)(D) with 21 U.S.C. § 601(m)(2)(A)]. The USDA did initiate a screening program to detect DES residues but never initiated a program or regulations specifically addressing condemnation of meat containing DES residues. Congress granted authority regarding use of DES in animal feed and implants to the FDA, not to the USDA. However, inspection and enforcement under the Meat Inspection Act is clearly vested in the USDA.

In summary, claimant contends case law, congressional history, and statutory construction provide authority to determine the classification of food conditions which may render food adulterated under this second definition. Unreasonable toughness such as that examined in *United*

States v. 24 Cases, Etc., 87 F.Supp. at 826, renders food unfit. Particular animal feeds which would result in offensive texture, color, consistency, or alter the normal ratio of edible nutritional meat to waste products may also render meat unfit. *See* 133 Cong.Rec., 33849-33859 (1967). In a condemnation action in which the burden of proof is placed upon the government, the particular unfitness of the product to be condemned must be proven as a matter of fact. *United States v. 24 Cases, Etc.*, 87 F.Supp. at 828. *See United States v. Lexington Mill & E. Co.*, 232 U.S. 399, 34 S.Ct. 337, 58 L.Ed. 658 (1914). The allegation of unfitness must be independent of the allegation of injuriousness; unfitness for human food is an independent definition of adulteration. The government has failed to identify the alleged unfitness, and to show that the Secretary's discretion was properly exercised. The Court concurs generally with the claimant's contentions, however, suggests that consideration of this thesis is fully addressed and adopted below but for other reasons.

Judicial Review

While the foregoing findings should suffice and comment as to the propriety of the Secretary's opinion is probably not necessary, in light of the fact that a substantial thrust of the plaintiff's case is geared to this opinion and as it is of significance here, the Court, if permissible, and within the purview of its authority, now addresses the issue directly. In this, the Court has retained some reservation, having closely reviewed the provisions of 5 U.S.C. §§ 701 through 706.

Section 701(a)(2) provides that these provisions do not apply when "agency action is committed to agency discretion by law." In the only case in which it has mentioned

this exception, the Supreme Court explained that it applies when the statute authorizing the agency action is "drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971). The lower courts have quoted this language literally dozens of times and are frankly confusing. At first glance it would seem, however, that the broad discretion granted the Secretary of Agriculture to exercise his "judgment" whether something "may be unfit for human food" would fall within the section 701(a)(2) exception.

Claimant contends that in the present case there is no indication that Congress intended to preclude judicial review of USDA action taken pursuant to the Meat Inspection Act. Claimant urges that the Senate debate concerning the Meat Inspection Act, included in 113 Cong.Rec. 35357 (1967), discusses the statutory power given to the Secretary to take over meat production plants which are not in compliance with federal law. In response to inquiry, the Senate was assured by Senator Miller, the Iowa Senator serving on the Senate Committee on Agriculture and Forestry who contributed to drafting of the Act, that the action of the Secretary would be subject to the judicial review provisions of the Administrative Procedure Act. Further, the purpose of the Meat Inspection Act, to protect the consumer from unwholesome meat through court-ordered condemnation, supports the contention that the Secretary's exercise of discretion is subject to court review.

It is this Court's view that a district court may set aside an agency determination if it is found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "To make this finding the Court must consider whether the decision was based on a consideration of the relevant factors and whe-

ther there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe,* supra at 416, 91 S.Ct. at 823. The United States Court of Appeals for the District of Columbia states that an agency "cannot act arbitrarily nor can it treat similar situations in dissimilar ways." *Garrett v. F.C.C.,* 513 F.2d 1056, 1060 (D.C. Cir.1975). Further, "agency action cannot stand when 'it is so inconsistent with its precedents as to constitute arbitrary treatment amounting to an abuse of discretion.' " *Id.* Agency regulations are issued for the benefit of both the agency and public, and the agency must be held to the terms of its regulations. *United States v. Coleman,* 478 F.2d 1371, 1374 (9th Cir. 1973).

It is generally recognized that agency action that fits the exception is subject to "limited" review, *Littell v. Morton,* 445 F.2d 1207 (4th Cir. 1971). Probably the soundest view was given by the Ninth Circuit in *Ness Investment Corp. v. United States Dept. of Agric., Forest Service,* 512 F.2d 706, 715 (1975), where, after a lengthy and detailed discussion of the issue, the Court of Appeals declared:

> Where consideration of the language, purpose and history of a statute indicate that action taken thereunder has been committed to agency discretion: (1) a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions; (2) but a federal court does not have jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion consists only of the making of an informed judgment by the agency.

This analysis dovetails nicely with Davis' rationale [Davis,

Administrative Law Treatise, § 28.16 (Supp.1976)]. We presume that Congress never intends to give an agency discretion to violate a statute, much less the Constitution. At any rate, it is quite clear that a reviewing court is *not* empowered to substitute its judgment for that of the agency. *Overton Park,* supra 401 U.S. at 416, 91 S.Ct. at 823. As a matter of substance, the agency's judgment will fall only if it flunks the "rational basis" test. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed. 2d 447 (1974); *Hurley v. United States,* 575 F.2d 792 (10th Cir. 1978). "The arbitrary and capricious standard of review does not require that the agency's decision be supported by substantial evidence, but only that it have a rational basis in the law." *Id.* at 793-94.

In every event, the Court is comfortable with these guidelines and is convinced the findings set forth in Exhibit 69 present sufficient data on which a judgment can be made as to the propriety of the ultimate decision.

The claimant contends that the alleged multitudinous examples of arbitrary action in the present condemnation proceedings are so numerous that an exhaustive listing is beyond the scope of its supplemental brief. However, a flagrant example urged by claimant is the USDA's departure from prior practice of permitting marketing of meat suspected or actually found to have DES residue. Claimant further contends that the government seeks to avoid arbitrariness by asserting § 601(m)(2) as a valid basis for finding adulteration in this proceeding, based upon the post-seizure, April 22, 1980, publication of the USDA explant program. 45 Fed.Reg. 26947-26950 (1980).

While the Court concurs with claimant's contentions, this conduct does, in and of itself, serve as a basis for its opinion.

Simply stated, it is the Court's view that when an administrative opinion is geared to wholly unfounded bases of fact, none of which can be reasonably established, it makes no sense at all. Such conduct is arbitrary and irrational and is most deserving of the Court's review. This is such a case.

In great measure, on the strength of the findings reviewed above, the following clarification is in order. A pertinent portion of the opinion is repeated in the interest of clarity:

> FSQS considers animals treated with DES to have been treated with or exposed to a substance that may impart a biological residue which *would* make the edible tissues of the animals unfit for human food or otherwise adulterated under the Federal Meat Inspection Act [21 U.S.C. 601(m)]. (Emphasis added). (Ex. 69).

If the evidence adduced in this case, even by the government's standards, suggests that DES implanted cattle probably *won't* make the edible tissue of the animal unfit for human food, by what authority may a Secretary summarily conclude that it would? Without review, at best, the government's evidence suggests that it is remotely possible (Doull) that implanted cattle render the beef adulterated.

And further:

> FDA and FSQS are working closely together . . . to eliminate the illegal use of DES and to require the reconditioning of animals, to which DES has been administered at feedlots, to make them fit for use as food . . . . FSQS bases its action on FDA's determination that removal of a DES implant followed by a withdrawal period of 41

> days . . . is necessary to recondition the animals to make them fit for use as food. [45 F.R. 28947, 28948 (April 22, 1980)].

This Court has attempted to reasonably track the government's anomaly as it relates to its treatment of DES implanted cattle; for whatever reason it has acquiesced in the slaughter and distribution of DES implanted beef. At some point in time, it is acknowledged that DES is ingested into the body system of the steer. By its calculations, DES, at the time of slaughter, is measured in parts per trillion, i.e., .6 ppt (p. 19). Now, recalling government counsel's argument that DES is DES by any quantum, it strikes the Court that if the administrator of the Food Safety and Quality Services distinguishes *that* quantity from what is anticipated in the normally implanted steer, i.e., .02 ppb in the kidney (Ashbacher), as here, in the interest of making the animal fit for food, such a distinction is wholly arbitrary. Indeed, if these are the bases of the Secretary's opinion, then the Court must conclude that *his* opinion makes no sense at all. It is irrational and is not deserving of this Court's consideration. It is without merit and it fails.

Adulteration Under 21 U.S.C. § 601(m)(3)?

In the interest of clarity the last section of the Act under which the government proceeds is repeated as follows:

> The term "adulterated" shall apply to any carcass, part thereof, meat or meat product under. . . the following circumstances: . . . if it consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food.

The government, by its argument, seemingly contends that the key provision of this section is "or is for any other reason", suggesting that the intent here is to prevent the consumption of meat products for reasons not covered in § 601(m). It is certainly obvious that this case does not include contentions or evidence relating to suggestions of filthy, putrid or decomposed substances. Claimant suggests that this section is not applicable, these words meaning disintegration, decomposure or change in the product, and that the words are to be considered in their usual and ordinary meaning. 1 Toulman, the Law of Foods, Drugs and Cosmetics, § 14.10 (2d ed. 1963). Claimant further suggest that the cases collected in Anno., Food-Adulteration-Federal Statutes, 45 A.L.R.2d 861, confirm the interpretation that this definition of adulteration addresses itself only to materials which occur naturally or unintentionally in the food product. Examples are decomposed food, mold and filth arising from insects and rodents commonly found in food processing areas. Claimant argues that the disjunctive phrase "or otherwise unfit for human food" has presented the courts with difficulty. Although the phrase has been construed as having strengthened and enlarged the scope of the definition, the extension has stopped short of including the intentional additions of substances to food. The disjunctive allows the finding of adulteration where food is discolored or ill-smelling, conditions which commonly occur and are not included in the enumerated conditions. *See United States v. 1,500 Cases More or Less, Etc.*, 236 F.2d 208 (7th Cir. 1956); 1 Toulman, the Law of Foods, Drugs and Cosmetics, § 14.11; Anno., Food-Adulteration-Federal Statute, 45 A.L.R.2d 861.

The Court concurs generally with the claimant's contentions and it is found that the beef in question is not

adulterated within the meaning of this section of the Act. Of paramount importance is the fact that this section involves a finding within the realm of that "which is probable," as opposed to the more modest test discussed above. It is doubtful if either party would seriously contend that such a test has either been reached or approached. In the Court's view no evidence was even offered consistent with these conditions.

Again, the findings and conclusions as noted in the foregoing resumes, as relate to §§ 2A and 3 of the Act, are determined to be findings of fact and conclusions of law as required under the Federal Rules of Civil Procedure, Rule 52, and in all respects the Court finds that the plaintiff has failed in its burden of proof to establish that the beef in question is adulterated. As a consequence thereof,

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the plaintiff's complaint *in rem* should be and is hereby dismissed; that the warrant of arrest entered by this Court on the 14th day of May, 1980, should be and is hereby set aside. In this regard, the claimant, or his authorized representative, on the 8th day of May, 1981, at 2:00 o'clock P.M., or at his convenience thereafter, may present a certified copy of this order to the U.S. Marshal or his duly authorized representative at Wichita, Kansas, at which time the beef in question, being approximately 2,156 boxes of boned beef, including 193 boxes of liver, now in storage at the Kansas Cold Storage Plant of Wichita, Kansas, shall be released unto him.

The costs of this action, including the cost of storage of beef, are assessed against the government.

Claimant's claim for attorney fees and costs of litigation are taken under advisement. In this, the Court is mindful of the provision of the Equal Access to Justice Act but in doubt as to its applicability here. Claimant counsel is at liberty to prepare his motion and briefs as relate to this matter at his earliest convenience.

The Court is further mindful that the commercial value of the beef in question has probably diminished by reason of time and delay. In this, it is assumed that an appropriate claim will be processed, either under the provisions of the Federal Tort Claims Act or perhaps within the framework of this litigation. In every event, this Court retains jurisdiction as to its disposition.

IT IS SO ORDERED.

APPENDIX D

JANUARY TERM – February 23, 1984

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Alfred A. Arraj, District Judge.*

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	No. 82-1537
2,156 BOXES OF BONED BEEF WEIGHING APPROXIMATELY 154,121 POUNDS, and 541 BOXES OF OFFAL WEIGHING APPROXIMATELY 17,732 POUNDS, Defendant,	)	
JARBOE LACKEY FEEDLOTS, INC. Claimant-Appellant.	)	

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing in banc filed by applicant in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no

*Of the United States District Court for the District of Colorado, sitting by designation.

member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

APPENDIX E

EQUAL ACCESS TO JUSTICE ACT
28 U.S.C. § *2412(d)*

"(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

"(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

"C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

"(2) For the purposes of this subsection –

"(a) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

"(B) 'party' means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed; and

"(C) 'United States' includes any agency and any official of the United States acting in his or her official capacity.

"(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

"(4)(A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

"(B) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded pursuant to this subsection in such fiscal years.

"(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards,

the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards."

APPENDIX F

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, Cross-Appellee,	)	
vs.	)	Nos. 81-1743 & 81-1806
2,116 BOXES OF BONED BEEF WEIGHING APPROXIMATELY 154,121 POUNDS, and 541 BOXES OF OFFAL WEIGHING APPROXIMATELY 17,732 POUNDS,	)	
JARBOE-LACKEY FEEDLOTS, INC. Claimant-Appellee, Cross-Appellant.	)	

Appeal from the United States District Court
For the District of Kansas
(D.C. No. 80-1360)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Susan J. Atkinson, John J. Powers, III, and Robert J. Wiggers, Attorneys, Department of Justice, Washington, D.C., for Plaintiff-Appellant, Cross-Appellee.

Charles D. McAtee and Anne L. Baker of Eidson, Lewis, Porter & Haynes, Topeka, Kansas, for Claimant-Appellee, Cross-Appellant.

Before BARRETT, HILL and McKAY, Circuit Judges.

PER CURIAM.

After examining the briefs and the appellate records, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of these appeals. *See* Fed. R. App. P. 34(a); Tenth Circuit R. 10(e). The causes are therefore ordered submitted without oral argument.

This is an appeal and a cross appeal from an order of the district court dismissing plaintiff's *in rem* action filed pursuant to 21 U.S.C. § 673(a). The complaint alleged that the meat products at issue were adulterated within the meaning of 21 U.S.C. § 601(m)(1), (2)(A) and (3).

Claimants denied the allegations in their answer to the complaint but made no request for attorneys' fees in the event they successfully defended the action. Subsequent to trial, the issue of attorney's fees was raised in claimants' proposed findings of fact and conclusions of law submitted to the court.

On May 7, 1981, judgment was entered for claimants.[1] The court concluded, *inter alia,* that "[c]laimant's claim for attorney fees and costs of litigation are taken under advisement."

Plaintiff has appealed (No. 81-1743) from the judgment and claimants have taken a cross appeal (No. 81-1806).

The threshold issue, as claimants point out in their motion to dismiss, is whether the judgment constitutes a

[1]The judgment was amended nunc pro tunc on July 17, 1981, in ways which are not relevant herein.

final, appealable order. In Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980), we held that a judgment is not final where no decision has been made on a pending claim for attorney's fees. Here the district court clearly stated that the matter of attorney's fees was still an open issue.

The plaintiff maintains, however, that the district court cannot consider the issue of attorney's fees because it was not properly raised and because in any event appellant is not entitled to such fees as a matter of law. These are issues that should be considered in the first instance by the lower court. The district court has not yet indicated what its position will be in the matter of attorney's fees. Until it does, we have no jurisdiction to review these actions. *See* Catlin v. United States, 324 U.S. 229, 233 (1945); Century Laminating, Ltd. v. Montgomery, 595 F.2d 563, 565 (10th Cir.), *cert. dismissed,* 444 U.S. 987 (1979).

Claimants' motion to dismiss is granted. The appeal and cross appeal are dismissed as premature.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

THE UNITED STATES OF AMERICA, Plaintiff,	)	
	)	Vol. 37
vs.	)	Case No. 80-1360
2116 BOXES OF BONED BEEF, Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

On the 8th day of February, 1982, came on to be heard various motions in the above-entitled and numbered cause before the HONORABLE PATRICK F. KELLY, Judge of the United States District Court for the District of Kansas, sitting in Wichita.

APPEARANCES:

The Plaintiff appeared by and through its counsel, Robert Donlan, Robert M. Spiller, Jr., and Anthony Buccitelli;

The Defendant appeared by and through its counsel, Charles McAtee, Anne L. Baker and Wilbur Leonard.

* * *

(pp. 11-12)
[THE COURT]:

I think, lastly, so that we don't need to rehash this case, you should appreciate that this question that is before me today gave rise again for me to review carefully my memorandum of May, '81, the thrust of which suggested that in

the final analysis as it relates to the issue of adulteration of the beef I found that the plaintiff had failed in its burden of persuasion. The test there was, in effect, may DES implanted cattle render the beef adulterated. I found also that the claimant's evidence was overwhelming that the beef in question was not adulterated, and I addressed myself to the Secretary of Agriculture's opinion and found it to be arbitrary. I think my own reasoning was to say, in effect, it made no sense at all.

* * *

(pp. 113-116)

As to the retrospective aspect, I am convinced that "pending" means just that. This case was pending on October 1 of 1981 and the Equal Access to Justice Act is applicable. I will accept your representation as to the financial requisites of the claimant as having been met at least for the purpose of this argument. But in doing so, Mr. McAtee, I have reviewed this matter within the standards as I would understand substantial justification to mean, which, for the most part, is best defined in the history, which would suggest that the standard is one of reasonableness. The test of whether or not a Government action is substantially justified is essentially one of reasonableness. I believe that is a fair standard for me to apply here or for any case in this regard.

I am convinced that the filing of the seizure action by the United States Department of Agriculture was substantially justified. You have asserted within your argument and requested considerations of that portion of the Act that addresses itself to bad faith and, in part, blended your arguments of substantial justification with suggestions of bad faith. I specifically find no evidence of bad faith exercised at the hands of the Department of Agriculture or their attorneys in the preparation or the filing of this case, nor do I find it in issue here. I appreciate within the

framework of your counter complaint are certain suggestions and allegations that would reach suggestions of bad faith, but that's not before me, nor should it be, and on the strength of what I have had at hand, I find none.

Conversely, as it relates to the propriety of the filing of this case – that is, the reasonableness, the substantial justification or the weight given by the Department of Agriculture and the Department of Justice – I would find that as of April of '80 Jarboe-Lackey cattle had been illegally implanted with DES after its legal deadline. If I recall the decision, I addressed myself to that and have no problem in acquiescing the fact that probably Mr. Lackey was not aware of this circumstance, but illegal nonetheless. I would find that the DES implants were prominent and palpable in the cattle's ears at the time of slaughter. I would find that at that point in time, which is significant here as I would look at what transpired in April, there was ongoing a DES ban by the FDA and the Agriculture Department. There was in the hands of the enforcement arm of that department or those departments responsible published scientific treatises that would suggest that the tissue residue persisted in implanted cattle and, most important, I would find that DES was a known carcinogen in humans and in animals.

It would seem to me with those facts at hand it would be reasonable for the Government's representative to conclude that unless the beef was seized the meat or the byproducts in this action would be introduced into commerce, the thrust of which, it seems to me, most reasonably suggests that the Government had every right, if not the duty, to proceed with the seizure action.

Now, with all of that said, having heard the case and the evidence, having listened intently to every word of it – I

think I said in my decision that I'm sure that this Court and those in attendance probably learned more about diethylstilbestrol, the effect of implants, the effect of it on cattle and the ultimate effect, if any, on beef here than anywhere else. And when I heard it all, made the findings that I did, the effect of which is to simply say implanted cattle would not render the beef adulterated. The test there was may it give rise to injury or whatever, the ultimate test of adulteration, and, in addition, the Secretary's opinion was an arbitrary one.

* * *

(pp. 119-120)

MR. McATEE: May it please the Court, for the purposes of appeal, the Court has indicated some peripheral awareness of some of the claimant's claimed justification for filing its malicious prosecution counter claim and some evidence that may have been available to the Government preceding and throughout this litigation by which the Government knew or reasonably should have known that it could not support or prevail upon its thesis and premise presented to this Court. I recognize the Court's decision in dismissing our counter claim. I'm not sure that I understand the legal rationale with respect to the references as being untimely and not properly before the Court. I really don't understand the jurisdictional basis for dismissing it once it was permitted to be filed. But be that as it may, I think it is essential for the claimant's interest to frankly rebut both the Court's finding of substantial justification at the time the case was filed to have in this appellate record our proferred evidence in support not necessarily of our counter claim, although we suggest that it does go to support the allegations of our counter claim, but have in this record the basis for our position that the initiation and ultimately the continuation of this litigation was not

substantially justified. So, I know of only one way to do that and that is to proffer that evidence into the record.

THE COURT: I will not hear it, Mr. McAtee. I think Mrs. Baker did address right before – or you did – that you wanted an evidentiary hearing. You're overruled. I will hear no further evidence on this case.

APPENDIX H

August 29, 1980

To: Donald L. Houston, Administrator*
Food Safety and Quality Service
U.S. Dept. of Agriculture
Washington, D.C. 20250

From: James P. Buchele, United States Attorney
District of Kansas

Re: United States v. 2116 Boxes of Beef, etc.
District of Kansas
(The DES Beef Case)

While USDA has been ably represented by Mr. Buccitelli of your General Counsel office, and I am sure he has imparted his views to the appropriate persons, I feel that as trial counsel in this case I have a duty to express my views on its status, our chances of success, and financial exposure to a high level official within USDA.

Attached find excerpt from the record, remarks made by Judge Kelly which express his current attitude toward this case. These views were restated and amplified subsequently when I went to his office to request a court reporter to prepare the attached transcripts.

These comments were made after the Judge had reviewed the summary judgment and affidavits, which essentially set forth our entire evidence, which seeks to establish the meat is adulterated as it may be injurious to health. We are

*This document was attached in its original form to petitioner's petition for rehearing before the Court of Appeals. The memorandum is reprinted verbatim in this Appendix for the convenience of this Court.

arguing that since there is no known effect level for DES, if it is present in meat, that it is adulterated. While the absence of verifiable information usually gives deference to the government's position in food cases, we are burdened here with:

(a) A level that is so low that its presence is even an issue in the case, and

(b) That a single carcinogen in the quantity which we allege is present in the muscle has never been identified to have caused a single cancer, even in a mouse.

Our experts (from FDA) have presented statements which outline the government's case and the research that they rely upon. To accept the argument we make requires faith in scientific analysis, conclusions and extrapolations. Reasonable men could easily differ and as to the danger of this meat being consumed by the public. The Judge indicates that he remains unconvinced that it may be injurious to health.

While as your advocate I have strongly urged otherwise, I am personally unconvinced that our evidence meets the standard of "reasonable possibility" of injury set forth in the American Seafood case, which I believe the Judge plans to follow. I am of the opinion that had we proceeded to trial last week, we would have lost. Having observed and interviewed our experts on the may be dangerous to health issue (Condon and Andrews), I do not believe their testimony will be any more convincing than their affidavits, which the Judge has already said isn't enough for him.

Unless there is additional and more convincing evidence available on the health hazards of minute amounts of DES

in meat (17 to 69 ppt), I believe that this Judge is prepared to rule that the meat under seizure is not adulterated under the FMIA.

Judge Kelly is also concerned with the equities in this case and has advised me that he is considering calling a settlement conference sometime before September 23. Further, if such a conference were called, that he would expect someone from the USDA to be present who has settlement authority.

I conclude that by "settlement authority" he means authority to compromise from the position that the meat is adulterated and must be destroyed at the claimant's sole expense, which I have maintained pursuant to USDA instructions. In this regard, our position is difficult to defend.

(1) Argument: The presence of DES even though in a small amount causes cancer and has other adverse effects the extent of which are unknown. The available science was assimilated by the FDA which published this decision on June 29, 1979, banning the drug.

Problem: The FDA actions following this determination, which is the cornerstone of our argument, reflected no urgency concerning the public consuming DES implanted beef. FDA's failure to immediately stop the sale of implanted beef was worsened by their extending the time for implantation on three separate occasions for a total of 120 days. The result was that literally thousands of *tons* of DES implanted beef were permitted to be consumed *after* the determination was made.

Am I expected to argue that these discretionary acts did not endanger the public health, but to permit the marketing of these 151,121 pounds of meat does?

(2) Argument: USDA in enforcing FMIA has a duty to keep DES implanted meat from consumers as it may be hazardous.

Problem: If USDA feels so strongly about this issue, where is the regulation that says meat which is implanted with DES is per se adulterated. We find ourselves over one year after the decision by FDA (which we rely on) and there has been *no* administrative action by USDA. The court is being asked to do something USDA has not done for itself.

Under (m)(2) of the FMIA, per se regulation prohibiting slaughter of DES implanted cattle could be promulgated. The standard for court review would then be arbitrary, capricious and unreasonable standard. We could win these cases.

The FDA and USDA actions (or inaction) in this regard makes the court and me, frankly, wonder how serious the government's position really is and why one individual is to be penalized to this extent in the face of their inconsistent conduct. I am faced with attempting to convince a United States District Judge that the administrative agencies have the discretion to do things which he cannot. If you want to take on a tough issue, try that one sometime.

The "hard line" which we have taken on disposition in light of these regulatory inconsistencies colors the court's view of this case. His comments in the record clearly indicate to me that if the government ultimately loses this case, it is going to be expensive. We can count on storage and boning costs and interest on the value ($250,000) from April 17, 1980. As I read his attitude, I think he would like to find a way to force the government to buy the meat and destroy it. If this were the result, our exposure here would exceed over $300,000. I doubt that attorney fees could be

awarded, but am of the opinion someone should consider the question.

In summary, I believe that it is likely the court will rule the meat is not adulterated, finding that it has not been established that it may be reasonably possible to injure health. I doubt the meat will ever be ordered destroyed by this Judge, unless he can find a way to make the government pay for it. I believe to take this case to trial is inviting disaster on two fronts, bad case law and exposure to financial judgment vs. the government.

I recommend that I or someone be given authority to *get out* of this case as soon as possible. At this time, I would consider a clean break a victory and am uncertain it is possible. I certainly wouldn't dismiss the case without a release from the claimant.

As an attorney, one is often called upon to be an advocate for people or ideas they personally don't like or believe in. As a government attorney, I have from time to time also been the recipient of the wrath and anger from a citizen whose personal interests varied from that of the government. I have never before, however, lacked the personal enthusiasm for my client's position on the facts or enforcement discretion as I do here. As my client, you are entitled to know this.

Accordingly, you may want to consult with the Department of Justice to find an attorney that has more personal enthusiasm for placing a man in bankruptcy to prove a point. If it is your decision to request other counsel, I will assist in any way possible. If you want me to continue, in light of what is stated here, I will do my best.

If USDA would like to negotiate a settlement, I believe that I can be helpful. This is my recommendation.

The decision must be made during the week of September 2, 1980, as the time is short and there is a great deal of work to be done. Pretrial conference is set for September 23, 1980 and trial October 20.

cc: Dan Marcus, General Counsel, USDA
Miriam Bender, Assistant General Counsel
Tony Buccitelli, Attorney, Office of General Counsel
Alice Daniels, Assistant Attorney General, Civil Division
Larry McWhorter, Deputy Director, Executive Office for U.S. Attorneys

---

APPENDIX I

JULY TERM – August 9, 1982

Before Honorable Monroe G. McKay and Honorable Stephanie K. Seymour, Circuit Judges

UNITED STATES OF AMERICA, Plaintiff-Appellant,	)	
vs.	)	No. 82-1488
2,156 BOXES OF BONED BEEF WEIGHING APPROXIMATELY 154,121 POUNDS, and 541 BOXES OF OFFAL WEIGHING APPROXIMATELY 17,732 POUNDS, Defendants,	)	
JARBOE LACKEY FEEDLOTS, INC. Claimant-Appellee.	)	

This matter comes on for consideration of the motion of the United States of America to dismiss the captioned appeal.

Upon consideration whereof, it is ordered that the motion is granted. The appeal is dismissed.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

A true copy

Teste

Howard K. Phillips
Clerk U.S. Court of
Appeals, Tenth Circuit

By
/s/ Chere Bossio
Deputy Clerk

APPENDIX J

H.R. 5059—EXTENSION OF AUTHORIZATION* FOR THE EQUAL ACCESS TO JUSTICE ACT (TITLE II, PUBLIC LAW 96-481)

Wednesday, March 14, 1984

U.S. House of Representatives,
Subcommittee on Courts, Civil Liberties
and the Administration of Justice,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met at 10:00 a.m. in Room 2226 of the Rayburn House Office Building, the Honorable Robert W. Kastenmeier, chairman of the subcommittee, presiding.

Present: Representatives Kastenmeier, Mazzoli, Synar, Schroeder, Morrison, Moorhead, Hyde, DeWine and Kindness.

Staff present: Gail H. Fogarty, Counsel, Joseph V. Wolfe, Minority Associate Counsel and Audrey Marcus, Clerical Staff.

MR. KASTENMEIER. The subcommittee will come to order.

Today the Subcommittee on Courts, Civil Liberties and the Administration of Justice will review the implementation of the Equal Access to Justice Act, which is Title II, Public Law 96-481, and examine the legislative proposal, H.R. 5059, which I have introduced as a discussion vehicle to extend the authorization of those portions of the act which expire on October 1st of this year.

---

*This transcript is a copy of the unedited and unrevised transcript of the Subcommittee's Hearing.

As one of the main supporters of the legislation during the 96th Congess, I have been disappointed that the act has not been more extensively applied by agencies and courts. The primary purpose of the act was to increase the accessibility to justice as, say, in the administrative proceedings and civil actions of individuals, small businesses, and other organizations.

A three-year test period was set from October 1, 1981 to October 1, 1984, during which time the act would expand the liability of the United States for payment of attorney fees and other expenses when another party prevailed over the United States in either an adversary adjudication; that is, when the U.S. is represented by counsel or otherwise, or in a civil action.

The United States could only escape liability if, one, the Government demonstrated that the position of the United States was substantially justified or, two, if special circumstances would make an award unjust.

During the first two fiscal years; that is, fiscal year 1982 and fiscal year 1983, only 72 awards were granted, totaling $2,456,943, or less than $2.5 million.

Only eight administrative proceedings resulted in awards, and that total amount awarded was less than $36,000, although 192 applications were filed during these two years.

At the court level, of 166 cases, wherein fee applications were filed and closed in those two years, 64 resulted in awards, totaling $2,421,000.

These awards are dramatically less than the $100 million annual cost estimated by the Congressional Budget Office and higher amounts predicted by the Justice Department.

Part of the problem is that the agencies and courts are, I believe, misconstruing the act.

For example, agency heads have sought to limit or reverse awards which administrative law judges and other adjudicative officers made. The act did not contemplate, really, such agency review.

Another problem is the courts have construed the position of the United States, which must be substantially justified, in a narrow fashion, which has helped the Federal Government escape liability for award.

H.R. 5059 clarifies both of these points. However, I would like to emphasize that when the escape clause was originally written, allowing the United States to escape liability when it demonstrated the position was substantially justified, it was understood that the position of the United States was not limited to the Government's litigation position but included the underlying action, including agency action which led to the litigation.

In addition, "substantially justified" was not the same as "reasonable," a term that was rejected outright. Rather, the term required more than that the Government show it had merely acted reasonably.

Office - Supreme Court, U.S.
FILED
JUL 19 1984
ALEXANDER L. STEVAS
CLERK

(2)

No. 83-1916

In the Supreme Court of the United States

OCTOBER TERM, 1984

JARBOE-LACKEY FEEDLOTS, INC., PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ROBERT B. NICHOLSON
ROBERT R. DONLAN
EDWARD T. HAND
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT M. SPILLER, JR.
Associate Chief Counsel
Food and Drug Administration
Rockville, Maryland 20857

ANTHONY J. BUCCITELLI
Attorney
Department of Agriculture
Washington, D.C. 20250

23 pp

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether, in determining that "the position of the United States" was "substantially justified" so as to preclude an award of attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A), the court of appeals correctly looked to the government's position in the lawsuit, rather than to its position in the agency proceedings and actions that led to the litigation.

2. Whether the court of appeals correctly held that the test for determining "substantial justification" under EAJA is one of "reasonableness," rather than "slightly more than reasonableness."

3. Whether the court of appeals correctly concluded that the district court did not abuse its discretion in refusing petitioner's proffer of additional evidence in support of petitioner's claim for attorneys' fees, when the district court already had a sufficient record before it to decide the issues.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 2

Statement 2

Argument 5

Conclusion 16

TABLE OF AUTHORITIES

Cases:

Bell v. *Goddard*, 366 F. 2d 177 2

Berman v. *Schweiker*, 713 F. 2d 1290 12

Boudin v. *Thomas*, 732 F.2d 1107 ..... 9, 10, 12

Broad Avenue Laundry & Tailoring v. *United States*, 693 F.2d 1387 ..... 6, 7, 9

Dougherty v. *Lehman*, 711 F.2d 555 12

Foley Constr. Co. v. *United States Army Corps of Engineers*, 716 F.2d 1202, cert. denied, No. 83-998 (Apr. 16, 1984) 12

Matthews v. *United States*, 713 F.2d 677 12

McDonald v. *Schweiker*, 726 F.2d 311 12

McQuiston v. *Marsh*, 707 F.2d 1082 14

Morris Mechanical Enterprises, Inc. v. *United States*, 728 F.2d 487 12

NRDC v. *EPA*, 703 F.2d 700 ..... 9, 10

Page

Cases—Continued:

Premachandra v. *Mitts*, 727 F.2d 717 8

Rawlings v. *Heckler*, 725 F.2d 1192 ..... 9, 10, 12

Regional Rail Reorganization Act Cases, 419 U.S. 102 11

Rhone-Poulenc, Inc. v. *FDA*, 636 F.2d 750 2

S & H Riggers & Erectors, Inc. v. *OSHRC*, 672 F.2d 426 12

Spencer v. *NLRB*, 712 F.2d 539, cert. denied, No. 83-981 (Apr. 16, 1984) 6, 7, 8, 9, 10, 13

Tyler Business Services, Inc. v. *NLRB*, 695 F.2d 73 ..... 7, 9, 12

Walls v. *Mississippi State Dep't of Public Welfare*, 730 F.2d 306 8

Wyandotte Savings Bank v. *NLRB*, 682 F.2d 119 12

Statutes:

Equal Access to Justice Act:

5 U.S.C. 504 note 8

28 U.S.C. 2412(b) 4, 14

28 U.S.C. 2412(d) 4, 10, 14

28 U.S.C. 2412(d)(1)(A) 2, 6, 7

28 U.S.C. 2412(d)(3) 7

28 U.S.C. 2412 note 10

Page

Statutes—Continued:

Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.* 3

21 U.S.C. 601(m) 3

Miscellaneous:

44 Fed. Reg. 54852 (1979) 2

H.R. 5479, 98th Cong., 2d Sess. (1984) 11

H.R. Rep. 96-1418, 96th Cong., 2d Sess. (1980) 9, 12

S. 919, 98th Cong., 1st Sess. (1983) 10, 11

S. Rep. 96-253, 96th Cong., 1st Sess. (1979) 9

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1916

JARBOE-LACKEY FEEDLOTS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 726 F.2d 1481. The oral rulings of the district court on the attorneys' fee issues raised in the petition have not been reported. The Appendix to the Petition contains only a portion of one of the two oral rulings (Pet. App. 99a-103a) and none of the other oral ruling; relevant portions of both of those rulings are noted in this brief. The district court's written orders are reproduced at Pet. App. 21a-22a. The opinion of the district court in the underlying litigation (Pet. App. 23a-89a) is reported at 516 F. Supp. 321.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1984. A petition for rehearing was denied on February 23, 1984 (Pet. App. 90a-91a). The petition for a

writ of certiorari was filed on May 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A), provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

STATEMENT

1. For many years, ranchers and feed-lot operators administered the chemical diethylstilbestrol (DES) to beef cattle, in feed or as an implant, to help the cattle gain weight faster with less feed. By 1966, it was recognized that DES causes cancer. See *Bell* v. *Goddard,* 366 F.2d 177, 179-181 (7th Cir. 1966). In 1979, based upon new scientific evidence that the use of DES leaves potentially carcinogenic residues in edible portions of meat, and after lengthy rulemaking proceedings, the Food and Drug Administration withdrew its approval of the use of DES in feed and implants. 44 Fed. Reg. 54852 (1979). The FDA's order was upheld in *Rhone-Poulenc, Inc.* v. *FDA,* 636 F.2d 750 (D.C. Cir. 1980). At the request of ranchers and feed-lot operators, including petitioner, the FDA twice extended the date on which the DES ban was to take effect; however, in August 1979 the feeding or implanting of DES was finally prohibited, effective November 1, 1979 (see Pet. App. 2a).

On April 17, 1980, a United States Department of Agriculture inspector at a Kansas slaughterhouse discovered recently-implanted (*i.e.*, post-November 1, 1979) DES pellets in the ears of slaughtered cattle owned by petitioner; USDA then retained 273 of petitioner's beef carcasses in the slaughterhouse (Pet. App. 2a-3a). Some of the ears of these carcasses were tested, and all the tested ears were found to contain enough DES to leave a residue in the meat (*id.* at 3a). In May 1980, the United States filed a seizure action against the meat in the United States District Court for the District of Kansas; the government charged that the meat was "adulterated" within the meaning of the Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.*, because it contained DES residue.

2. The case was tried to the district court. At the close of the government's case, the district court denied petitioner's motion for a directed verdict, stating that the government had presented "not just a prima facie case but * * * clear and convincing evidence, overwhelming evidence, as I see it * * * that that beef is adulterated; that it may possibly injure someone in this country or across this country." 25 R. 20-21. After the conclusion of trial and a six-month period of reflection, however, the court held that the United States had not carried its burden of proving adulteration and dismissed the libel (Pet. App. 21a-89a). In order to prevail in the action, the government had to prove that: (1) DES is a "poisonous or deleterious" substance within the meaning of the Federal Meat Inspection Act; (2) the seized meat contained DES; and (3) the presence of DES in the meat "may render it injurious to health." 21 U.S.C. 601(m). The district court found that DES causes cancer (and thus is a "deleterious substance") (Pet. App. 29a-30a), and that the seized meat contained DES implanted after November 1, 1979 (*id.* at 30a, 46a-47a). But the district court also ruled that the government had failed to prove that the quantities

of DES in petitioner's meat alone would be injurious to the public, especially in light of the anticipated effects of the ban on using DES in the future (*id.* at 31a, 64a, 69a).

3. After the United States decided not to pursue an appeal, petitioner requested attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(b) and (d), claiming that the government's position was not "substantially justified" and that the government had acted in bad faith. Following briefing and oral argument, the district court denied petitioner's request for attorneys' fees. The court specifically found that the government's position was reasonable — and thus substantially justified — and that there was no evidence that the government had acted in bad faith (Pet. App. 100a-101a). Indeed, the court ruled that in light of the known carcinogenic effects of DES, the existence of the DES ban, and the clear presence of recent DES implants in the seized carcasses, "the Government had every right, *if not the duty,* to proceed with the seizure action" (*id.* at 101a (emphasis added)).[1] Finally, the district court declined petitioner's request to hold an evidentiary hearing concerning certain allegedly "newly discovered evidence" adduced by petitioner. The court concluded that the matters raised by petitioner had been fully aired at trial. 2/8/82 Tr. 120, 122-124; 3/5/82 Tr. 24-25.

4. The court of appeals affirmed in all respects (Pet. App. 1a-20a). The court first noted the narrow scope of appellate review of applications for attorneys' fees pursuant to EAJA (*id.* at 8a-9a). The court then observed that "[t]he law is clear that the test of substantial justification is essentially one of reasonableness in both law and fact" (*id.* at 9a

---

[1]The district court also observed, with its experience of the trial in mind, that this was "a classic case * * * that had to be tried" in order to resolve the bitter scientific dispute concerning the effect of DES in the seized meat. 2/8/82 Tr. 117.

(footnote omitted)). The court next turned to the issue of which government position — the litigation position, the underlying agency action, or both — must be "substantially justified" in order to preclude an award of attorneys' fees to a prevailing party. The court observed that ordinarily it will make no difference which position is considered (*id.* at 11a), but the court resolved any question about the matter in this case by holding that "the position of the United States" means "the arguments relied upon by the government in litigation" (*ibid.*). The court then concluded that the district court correctly found that the government's litigation position in this case was substantially justified (*id.* at 11a-13a).

The court of appeals also held that the district court did not abuse its discretion in finding that there was " 'no evidence that the government acted in bad faith in either the filing or preparation of this case' " (Pet. App. 14a). Finally, the court of appeals ruled that the district court did not abuse its discretion in refusing to take additional evidence on the issues of substantial justification and bad faith. Observing that an evidentiary hearing might be appropriate when the district court is not otherwise in a position to make findings concerning bad faith, the court of appeals held that the district court here was able to make such findings on the basis of the record already before it (*id.* at 15a). Similarly, the district court gave the parties "ample opportunity to brief and to argue the EAJA issue, including an opportunity to submit pertinent affidavits," and thus did not abuse its discretion in declining petitioner's proffer of additional evidence (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. While there arguably is a conflict in the circuits on the first question presented, that issue does not warrant this Court's review because resolution of the conflict here would not affect the

result in this case and because Congress is in the process of legislating a resolution of the conflict.[2] Nor do the other questions presented warrant review by this Court.

1. a. The court of appeals held that the "position of the United States" that must be substantially justified under EAJA is its litigation position, rather than the underlying agency action that led to the litigation (Pet. App. 11a). As the District of Columbia Circuit recently observed, neither the statutory language nor the legislative history of EAJA clearly defines which "position" is the one on which the statute is focused. *Spencer* v. *NLRB*, 712 F.2d 539, 547-549 (1983), cert. denied, No. 83-981 (Apr. 16, 1984). Nevertheless, the "normal meaning" of the text of Section 2412(d)(1)(A) suggests that "the position of the United States refers to the government's position in court and not before [the agency]." *Broad Avenue Laundry & Tailoring* v. *United States*, 693 F.2d 1387, 1390 (Fed. Cir. 1982). As the Federal Circuit explained (*ibid.* (brackets in original)):

> The Act provides for the awarding against the United States of attorney's fees "incurred by [the prevailing] party in any civil action . . . in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified." A fair and reasonable reading of those words is that the position referred to is that taken by the United States in the "civil action" in which the attorney's fees were "incurred." The provision addresses the award of attorney's fees in a civil action in court, and it is in that particular action in which the government takes a position.

---

[2]The Court recently declined to review the decision upon which the court of appeals here relied (see Pet. App. 11a) in deciding the same issue. *Spencer* v. *NLRB*, 712 F.2d 539 (D.C. Cir. 1983), cert. denied, No. 83-981 (Apr. 16, 1984).

Moreover, although Section 2412(d)(1)(A) does not expressly specify whether courts are to look to the government's litigation position or to its position in the underlying administrative proceedings, other sections of EAJA shed light on the issue. Thus, the statute provides that, in awarding fees to a prevailing party in an action for judicial review of an adversarial agency adjudication, the court shall include in that award fees and expenses incurred in the course of litigation before the agency unless the court finds "that *during such adversary adjudication,* the position of the United States was substantially justified" (28 U.S.C. 2412(d)(3) (emphasis added)). As the court of appeals reasoned in *Spencer,* 712 F.2d at 547-548 (footnote omitted):

> [T]he highlighted language indicates * * * that the government's "position," for the purpose of assessing its liability for attorneys' fees resulting from administrative adjudication, is the stance it adopted in litigation before the agency. It remains possible * * * that the phrase "position of the United States" was intended to have a different meaning when used in the context of litigation before the courts, but if Congress contemplated such a difference, it failed to indicate as much in the statute. In short, the unequivocal adoption of the "litigation position" theory in section 2412(d)(3) suggests that the identical phrase, when used without qualification in section 2412(d)(1)(A), should be interpreted as the posture adopted by the government before the court.

Accord, *Broad Avenue Laundry & Tailoring,* 693 F.2d at 1390-1391; *Tyler Business Services, Inc.* v. *NLRB,* 695 F.2d 73, 75-76 (4th Cir. 1982).

b. While we thus believe that the rule adopted by the court of appeals in this case best comports with the statutory language, it is important to note, as the court of appeals

itself recognized (Pet. App. 11a), that the issue petitioner asks this Court to decide is of little practical importance. See also *Spencer*, 712 F.2d at 552. In all but a few cases, the government's "litigation position" is simply a presentation or defense of the underlying agency action that precipitated the court proceeding; accordingly, a claimant's entitlement to attorneys' fees ordinarily will not be affected by any distinction between what the *Spencer* court called the "litigation position" theory and the "underlying action" theory (*ibid.*).[3]

Petitioner has not explained how — or whether — the rule it seeks would have changed the outcome here. There is good reason for this reticence. While petitioner has not specified which pre-litigation agency position it wishes to have considered on the "substantial justification" issue, the seizure of petitioner's beef — and thus this litigation — grew out of the FDA's ban on DES implants in cattle effective November 1, 1979. The agency order imposing that ban was affirmed by the District of Columbia Circuit prior to the district court's decision below (see page 2, *supra*). In these circumstances, the government's "position" surely was substantially justified, whether one considers its pre-litigation actions concerning DES or its decision to litigate this case.[4]

---

[3]For this reason, some courts have found it unnecessary to resolve the issue presented by petitioner. See, *e.g.*, *Walls* v. *Mississippi State Dep't of Public Welfare*, 730 F.2d 306, 326 (5th Cir. 1984); *Premachandra* v. *Mitts*, 727 F.2d 717, 730 n.17 (8th Cir. 1984).

[4]The central objective of EAJA, as explained in the preamble to the statute (5 U.S.C. 504 note), is to enable private parties to challenge unreasonable or oppressive governmental action by diminishing the deterrent effect of incurring large litigation expenses. At the same time, however, Congress did not wish to inhibit the government's legitimate efforts to enforce the law and sought to avoid imposing potentially huge costs on the federal treasury. Accordingly, Congress declined to enact a provision for the automatic award of attorneys' fees to private parties

In addition, it is not clear how the "position of the United States" could be anything but its litigation position in a government seizure action such as this one. This is not a case in which petitioner brought suit against the government to challenge an administrative ruling or other agency action. Rather, the "agency action" on which petitioner seems to focus is the government's decision to initiate this seizure action in federal district court; petitioner apparently contends that that decision was unreasonable because the government theretofore had permitted the use of DES for many years. See Pet. 3-4. But the decision to initiate litigation is part and parcel of the litigation itself. Accordingly, this is an inappropriate case for this Court to consider whether "the position of the United States" should be other than the government's litigation position.

c. The rule adopted by the court below is also the rule in four other circuits. *Boudin* v. *Thomas*, 732 F.2d 1107, 1115 (2d Cir. 1984); *Spencer* v. *NLRB*, *supra*; *Tyler Business Services, Inc.* v. *NLRB*, *supra*; *Broad Avenue Laundry & Tailoring* v. *United States*, *supra*. Petitioner contends that this rule conflicts with that adopted by the Third Circuit in *NRDC* v. *EPA*, 703 F.2d 700 (1983), and the Ninth Circuit in *Rawlings* v. *Heckler*, 725 F.2d 1192 (1984), in which those courts examined the agency's underlying action as part of "the position of the United States." In fact, however, the Third Circuit's decision does not present a sufficiently clear-cut conflict with the decision of the court below to

---

who prevailed in suits against the government. See S. Rep. 96-253, 96th Cong., 1st Sess. 6 (1979); H.R. Rep. 96-1418, 96th Cong., 2d Sess. 10 (1980). Instead, Congress selected an intermediate position designed to balance "the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights." H.R. Rep. 96-1418, *supra*, at 10; S. Rep. 96-253, *supra*, at 6.

warrant this Court's review, and the Ninth Circuit's decision is factually distinguishable.[5]

d. Finally, it is especially significant that Congress is aware of the issue raised by petitioner and is actively considering legislation that would define "position of the United States" in the statute itself. Section 2412(d) of EAJA was enacted as a three-year experiment, and it will automatically expire on October 1, 1984, unless extended by Congress. 28 U.S.C. 2412 note. The Senate bill to extend the Act is S. 919, 98th Cong., 1st Sess. (1983). Since it was introduced in March 1983, S. 919 has been modified to address a number of issues that have arisen in the administration of the statute during its experimental period. Among other things, the current version of the bill provides that the " 'position of the United States' includes the underlying agency action which led to the litigation, however fees and expenses shall not be awarded against the United States in

---

[5]In *NRDC* v. *EPA*, each panel member wrote a separate opinion, each expressing different views on the meaning of "position of the United States." While the views of Judges Gibbons and Thompson, taken together, are at odds with the decision below, the absence of an opinion for the court makes the position of the Third Circuit somewhat unclear. See *Boudin* v. *Thomas*, 732 F.2d at 1115. Review by this Court should await a more definitive statement from the Third Circuit about the rule it intends to follow.

In *Rawlings* v. *Heckler*, the Ninth Circuit held that it would consider the "totality of the circumstances prelitigation and during trial" (725 F.2d at 1196). In deciding to award fees, however, the *Rawlings* court stressed that the government had taken an entire year to settle the lawsuit (*ibid.*). The instant case did not involve a settlement, but in *Spencer* v. *NLRB*, upon which the court below relied in resolving the "position of the United States" issue, the court suggested that the government might well be liable for attorneys' fees on facts like those in *Rawlings*, "regardless of which theory is applied." *Spencer*, 712 F.2d at 555-556 & n.58.

defending a litigation position after the date such formal position has become substantially justified." The Senate Judiciary Committee has voted to report the version of S. 919 containing the definition of "position of the United States" just quoted. The House Judiciary Committee also has voted to report a bill to extend the Act (H.R. 5479, 98th Cong., 2d Sess. (1984)). Section 2(b) of H.R. 5479 provides that " 'position of the United States' includes, but is not limited to, the actions and omissions of an agency which led to the litigation."

Because of the "sunset" provision contained in the current statute, it is reasonable to assume that Congress will in fact take action on the pending bills before October 1, 1984.[6] Thus, by the start of this Court's next Term, Congress either will have allowed the Act to expire or reauthorized it in a form that may well include a statutory definition of "position of the United States." In either event, the correct interpretation of the current statute would have become a matter of extremely limited importance.[7] In these

---

[6]Petitioner notes (Pet. 10 n.4) that the pending legislation "has support from Republicans, Democrats and the Administration and is virtually certain to be enacted." We agree that petitioner's prediction is probably correct, but strongly disagree, for the reasons noted in text, that the likelihood of passage supports this Court's exercise of certiorari jurisdiction; on the contrary, it appears to make review totally unnecessary.

[7]Petitioner cites (Pet. 13 n.9) some recent remarks of Representative Kastenmeier in support of its interpretation of "position of the United States." But "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 132 (1974). If Congress as a whole shares Representative Kastenmeier's views, then it will include an appropriate amendment in the pending EAJA legislation.

circumstances, we suggest that the Court should defer to Congress.[8]

2. Petitioner next contends that the Court should grant review in order to decide whether, "[t]o be substantially justified, the government's position must be more than merely reasonable" (Pet. 15). As the court of appeals recognized, however, "[t]he law is clear that the test of substantial justification is essentially one of reasonableness in both law and fact" (Pet. App. 9a (footnote omitted)). Common sense belies the notion that Congress could have intended to make the United States pay attorneys' fees for taking "reasonable" positions. Moreover, the court's ruling is consistent with the House Report on EAJA (the test "is essentially one of reasonableness," H.R. Rep. 96-1418, 96th Cong., 2d Sess. 10 (1980)), and with the decisions of ten other courts of appeals.[9] In addition, it was accepted by petitioner itself in

---

[8]In the event that Congress extends the Act but fails to legislate a solution to the conflict asserted by petitioner, there will be time enough for this Court to resolve the matter in a subsequent case. In the meantime, only a minority of cases are affected by the issue on which petitioner seeks review, and this is not one of them. See pages 7-9 & note 3, *supra*.

[9]*Boudin* v. *Thomas*, 732 F.2d at 1115; *Dougherty* v. *Lehman*, 711 F.2d 555, 563-564 (3d Cir. 1983); *Tyler Business Services, Inc.* v. *NLRB*, 695 F.2d at 75; *S & H Riggers & Erectors, Inc.* v. *OSHRC*, 672 F.2d 426, 430 (5th Cir. 1982); *Wyandotte Savings Bank* v. *NLRB*, 682 F.2d 119, 120 (6th Cir. 1982); *Foley Constr. Co.* v. *United States Army Corps of Engineers*, 716 F.2d 1202, 1204 (8th Cir. 1983), cert. denied, No. 83-998 (Apr. 16, 1984); *Rawlings* v. *Heckler*, 725 F.2d at 1196; *Matthews* v. *United States*, 713 F.2d 677, 683 (11th Cir. 1983); *Morris Mechanical Enterprises, Inc.* v. *United States*, 728 F.2d 497, 499 (Fed. Cir. 1984). One panel of the Seventh Circuit has explicitly adopted the "reasonableness" standard, *Berman* v. *Schweiker*, 713 F.2d 1290, 1293 (1983), while another panel of that court has adopted essentially that standard by observing that "substantially justified" means that the government had a "solid legal claim or defense." *McDonald* v. *Schweiker*, 726 F.2d 311, 316 (1983).

the district court and the court of appeals.[10] Only one court of appeals has concluded that the test for "substantial justification" is "slightly more stringent" than one of reasonableness.[11]

In any event, as even petitioner concedes (Pet. 16), the distinction between "reasonable" and "slightly more than reasonable" "may seem relatively minor at first glance * * *." Indeed, to our knowledge, no case has ever turned on this semantic quibble, and petitioner has not explained how adoption of its preferred standard would have changed the result in this case.[12] Petitioner also speculates (Pet. 16) that the aggregate amount of attorneys' fees awarded pursuant to EAJA since its enactment has been lower than projected "in part" because of the courts' application of the reasonableness standard. If Congress shares petitioner's concern on this point, it presumably will include an appropriate amendment in the pending EAJA legislation; at present, however, neither the Senate bill nor the House bill would revise the reasonableness standard. Accordingly, there is no reason for this Court to consider the issue.

3. Finally, petitioner seeks review of the court of appeals' ruling that the district court did not abuse its discretion in declining petitioner's proffer of certain additional evidence

---

[10]See 2/8/82 Tr. 84 ("[S]ubstantial justification" means that "[t]here must be a reasonable basis in law and in fact."); Appellant's Br. 22-23.

[11]*Spencer* v. *NLRB*, 712 F.2d at 558. This issue was not presented by the petition for a writ of certiorari in that case.

[12]Petitioner argues (Pet. 17-18) that "[h]owever difficult it is to think of the government's [position] as 'reasonable,' it is impossible to characterize that illegal seizure as *more* than reasonable." This argument does not explain how the two phrasings would yield different results in this case. Moreover, petitioner does not explain how a court is to distinguish between government positions that are "reasonable" and those that are "slightly more than reasonable." The difficulty in making such hair-splitting distinctions counsels strongly against adoption of petitioner's view of the statute.

on the issues of bad faith and substantial justification. This fact-bound question about an exercise of judicial discretion was correctly decided below and does not warrant review by this Court.

Contrary to petitioner's assertion (Pet. 18), there is no conflict in the circuits on this point. In the case on which petitioner relies, *McQuiston* v. *Marsh*, 707 F.2d 1082 (9th Cir. 1983), the court of appeals required the district court to conduct an evidentiary hearing with respect to the government's alleged bad faith where the district court failed to make any findings on the issue. In contrast, the district court here was able, based on the lengthy litigation and numerous briefs filed on the issue (see Pet. App. 15a), to make an explicit finding that the government did not act in bad faith. Indeed, petitioner no longer challenges that finding to the extent that it was relied upon to deny attorneys' fees under 28 U.S.C. 2412(b), which codifies the "bad faith" exception to the American Rule against fee-shifting and makes it applicable to the United States (see Pet. 9 n.3). Instead, petitioner apparently seeks to introduce further evidence of the government's alleged bad faith in support of its claim for fees under 28 U.S.C. 2412(d). But having abandoned its claim for fees under the provision of EAJA expressly directed at bad faith, petitioner should not be permitted to revive that claim through the "back door" of Section 2412(d).

In any event, the court of appeals' conclusion that no further evidence was required to be taken here was based on the trial judge's intimate familiarity with the issues acquired during trial and on the "ample opportunity" afforded to the parties to brief and to argue the attorneys' fee issues. See Pet. App. 15a. And petitioner's assertion (Pet. 18) that it sought to proffer to the district court a privileged memorandum (see Pet. App. 104a-109a) prepared by a government attorney containing his pre-trial views on the lawsuit

is wholly unsupported by the record. Petitioner never identified that document — explicitly or vaguely — to the district court as possibly probative evidence. Indeed, petitioner did not seek to have the courts below consider the document until it attached the memorandum to its petition for rehearing in the court of appeals. As for the other evidence of alleged bad faith that petitioner attempted to proffer in the district court, the court observed, after sitting through a lengthy trial in which the merits of the government's position were discussed in detail, and after reading briefs and hearing oral argument on much of the same material during the attorneys' fee proceedings, "I have heard all of this and I don't need to hear any more" (2/8/82 Tr. 120). Under the circumstances of this case, such an exercise of discretion and common sense by the trial judge does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ROBERT B. NICHOLSON
ROBERT R. DONLAN
EDWARD T. HAND
Attorneys

ROBERT M. SPILLER, JR.
Associate Chief Counsel
Food and Drug Administration

ANTHONY J. BUCCITELLI
Attorney
Department of Agriculture

JULY 1984

DOJ-1984-07

Office-Supreme Court, U.S.
FILED
SEP 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JARBOE-LACKEY FEEDLOTS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID O. STEWART
(Counsel of Record)
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorney for Petitioner

Of Counsel:
CHARLES D. MCATEE
ANNE L. BAKER
EIDSON, LEWIS, PORTER & HAYNES
1300 Merchants National Bank Building
Topeka, KS 66612
(913) 233-2332

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

CASES:	Page
Buckley v. *Valeo*, 424 U.S. 1 (1976)	3
Sioux Tribe of Indians v. *United States*, 329 U.S. 684 (1946)	4
28 U.S.C. § 2412(d)(1)(A)	2
130 Cong. Rec. H9298 (daily ed. Sept. 11, 1984)	2
130 Cong. Rec. H9302 (daily ed., Sept. 11, 1984)	1
H. Rep. No. 992, 98th Cong., 2d sess. (1984)	2,3
S. Rep. No. 586, 98th Cong., 2d sess. (1984)	1, 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1916

JARBOE-LACKEY FEEDLOTS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Jarboe-Lackey Feedlots, Inc. submits this Supplemental Brief, pursuant to Rule 24(5) of this Court, to notify the Court concerning congressional action on pending legislation which would control the first two questions presented in the Petition for Certiorari, arising under the Equal Access to Justice Act (EAJA).

The EAJA will expire on October 1, 1984, and the Solicitor General has advised this Court that Congress "probably" will adopt legislation extending the Act. Brief for the United States in Opposition, p. 11, n.6. The House of Representatives approved such legislation by voice vote on September 11, 1984, 130 Cong. Rec. H9302 (daily ed., September 11, 1984), and the Senate Judiciary Committee has approved similar legislation and recommended its adoption to the full Senate. *See* S.Rep. No. 586, 98th Cong., 2d Sess. (1984).

The pending legislation, if approved, would have the following dispositive impact on two of the questions presented in the petition in this case:

(1) "Position of the United States"—The Tenth Circuit in this case ruled that "position of the United States" in 28 U.S.C. § 2412(d)(1)(A) refers only to the government's litigation position, not to the underlying agency action which gave rise to the lawsuit. Pet. App. A, pp. 10a-11a. The legislation approved by the House of Representatives, however, would reverse that holding, and provides a definition of that phrase (130 Cong. Rec. H9298) (daily ed., Sept. 11, 1984):

> "position of the United States" includes, but is not limited to, the actions and omissions of an agency which led to the litigation.

The bill reported by the Senate Judiciary Committee includes a similar definition specifying that "position of the United States" includes the underlying agency action. *See* S. Rep. No. 586, *supra*, p. 36. Indeed, the Senate Report specifically cites the Tenth Circuit opinion in this case as one of the judicial rulings which has erroneously limited the meaning of this key statutory phrase. *Id.*, pp. 7-8.

(2) The "Substantial Justification" Test—The court below ruled that to avoid paying fees under the EAJA's substantial justification test, the government need show only that its position was reasonable. Pet. App. A., p. 9a. But that interpretation is repudiated in the House Report accompanying the bill reenacting the EAJA (H. Rep. No. 992, 98th Cong., 2d Sess. 7 (1984)) (footnote omitted; emphasis added):

> Several courts have held correctly that "substantial justification" means more than merely reasonable. Because in 1980 Congress rejected a standard of

> "reasonably justified" in favor of "substantially justified," *the test must be more than mere reasonableness.*

In language of particular relevance to this case, the House Report also emphasized that the "[a]gency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the Act." *Id.* The Senate Report also asserted that the substantial justification standard is more demanding than mere reasonableness. S. Rep. No. 586, *supra*, pp. 10-11.

If the EAJA is reenacted over the next few weeks, these legislative statements cannot be dismissed as mere remarks of Congress which do not necessarily reflect the legislative intent in approving the EAJA. *See* Brief in Opposition, p. 11, n.6. Rather, those congressional statements will constitute authoritative legislative history concerning Congress's intent in reenacting the EAJA, and its response to erroneous judicial rulings like the decision in this case. Since the District Court held in this case that the government's action against petitioner was "arbitrary and irrational" and "makes no sense at all," Pet. App. C, pp. 85a, 86a, the "position of the United States" certainly could not be found to be substantially justified under the standards as explained by Congress in its most recent statements.

In these circumstances, the prudent course for this Court is to rule on the Petition for Certiorari only after Congress either completes its deliberations over reenactment of the EAJA, or abandons them. Such an accomodation of the legislative branch by this Court is not unusual. *See Buckley* v. *Valeo*, 424 U.S. 1, 143 (1976). In view of the October 1, 1984 expiration date of the EAJA, congressional action or failure to act will be clear in a relative-

ly short time from now. To rule on this petition before Congress has a full opportunity to reenact the EAJA could work a serious injustice on petitioner. Indeed, in *Sioux Tribe of Indians* v. *United States*, 329 U.S. 684 (1946) (per curiam), this Court granted rehearing on a previously denied petition for certiorari, vacated the decision below and remanded for consideration of the impact of intervening legislation. Similar action may well be appropriate in this case to ensure that petitioner's claim receives plenary consideration under the EAJA as it is in effect on October 1, 1984.

Respectfully submitted,

DAVID O. STEWART
(Counsel of Record)

MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorney for Petitioner

Of Counsel:
CHARLES D. MCATEE
ANNE L. BAKER
EIDSON, LEWIS, PORTER & HAYNES
1300 Merchants National Bank Building
Topeka, KS 66612
(913) 233-2332

Date: September 17, 1984